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In The

Supreme Court of the United States

No. 799

TERM 1968

THE LOCUST CLUB OF ROCHESTER, JOHN HUNT, BENNIE JASKOT, GEORGE SIGNOR, RICHARD STERLING, ANTHONY D'ANGELO, NELSON EVANS and JOSEPH FAVATA, all having offices or residing in the City of Rochester, County of Monroe and State of New York,

Appellants,

vs.

THE CITY OF ROCHESTER, HENRY GILLETTE, FRANK LAMB, RAYMOND LILL, WILLIAM MALOY, JR., WILLIAM J. MALLEY, MARIO PIRRELLO, WILLIAM LEGG, PETER BARRY and HYMAN FREEMAN, as Members of the Common Council of the City of Rochester; THE POLICE ADVISORY BOARD and DR. KENNETH W. WOODWARD, RABBI HERBERT BRONSTEIN, DR. WILLSON H. COATES, EDGAR S. LAMBERT, JAMES S. MALLEY, THE REV. DONALD J. MULCAHY, THE REV. JAMES A. ROCKWELL, ANTHONY R. SCHNEIDER and ROSS GUGLIELMINO, as Members of the Police Advisory Board, all having offices or residing in the County of Monroe and the State of New York,

Respondents.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JUDICIAL STATEMENT

—Over—

Daily Record Corporation
Rochester, New York
(7673)

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Respondents.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JUDICIAL STATEMENT

Appellants appeal from the judgment, decision, and/or order of the Court of Appeals, State of New York, entered

in the Court of Appeals on June 14, 1968, affirming the order of the Appellate Division, Fourth Judicial Department, of the State of New York, entered on January 11, 1968, which order reversed, on the law and facts the order of the Supreme Court of the County of Monroe, State of New York, which order declared portions of the ordinance establishing the Police Advisory Board invalid and unconstitutional; the said Appellate Division holding the said ordinance valid and constitutional; and Appellants appeal from the order of the Court of Appeals denying Appellants motion for re-argument, which order of the Court of Appeals was made and entered on September 26, 1968; and which order also recited that upon the appeal there were presented and necessarily passed upon questions under the Constitution of the United States and the said Court of Appeals held that Appellants constitutional rights were not violated.

I. OPINIONS BELOW

The opinions in the Courts below were reported in:

48 MISC. 2d 763, 265 N.Y.S. 2d 744;

29 A.D. 2d 134, 286 N.Y.S. 2d 99;

22 N.Y. 2d 802, 293 N.Y.S. 2d 903.

Annexed hereto and made a part hereof is Appendix A setting forth the opinions of the Supreme Court, Monroe County, State of New York; the opinion of the Appellate Division, Fourth Judicial Department, State of New York; and the opinion of the Court of Appeals of the State of New York together with the dissenting opinion.

II. GROUNDS OF JURISDICTION.

a) Plaintiffs-Appellants, brought this proceeding seeking a declaratory judgment as to the validity, legality and constitutionality of the ordinance of the City of Rochester establishing the Police Advisory Board. The declaratory judgment procedure is provided for in the Civil Practice Law and Rules of the State of New York, Section 3001, which section was formerly Civil Practice Act, Section 473, of the State of New York.

b) The Supreme Court, Special Term, Monroe County, entered an order declaring the ordinance establishing the Police Advisory Board invalid in part, which order was duly executed February 2, 1966 and entered February 4, 1966. Thereafter, upon appeal, the Appellate Division, Fourth Judicial Department, entered an order on January 11, 1968 reversing the order of the Special Term and directing entry of an order and/or judgment declaring the ordinance valid and constitutional. Thereafter, Plaintiffs-Appellants, appealed to the Court of Appeals of the State of New York, which, upon the opinion of the Appellate Division affirmed the order of the Appellate Division on June 14, 1968 with Judge J. Scileppi dissenting. Thereafter a motion was duly made on or about July 10, 1968 for re-argument and to amend the remittitur. The Court of Appeals on September 26, 1968 entered an order denying the motion for re-argument and amended the remittitur to show the following:

> "Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz: Plaintiffs argued that the ordinance creating the Police Advisory Board violated due process requirements in that the standards or norms of action were indefinite and vague; denied equal protection under the law to police officers; permitted Bills of Attainder contrary to Ar-

ticle I of the Constitution; and violated the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the Constitution. 'This court held that plaintiff's constitutional rights were not violated.'' See Exhibit C.

The Notice of Appeal was duly served on Robert Feldman, Attorney for the Respondent, City of Rochester, and on Ross Guglielmino, Attorney for the Police Advisory Board, on November 12, 1968. The said Notice of Appeal also was filed in the Monroe County Clerk's Office, Monroe County, and the Court of Appeals on the following respective dates:

November 12, 1968

c) Jurisdiction is conferred upon the Supreme Court of the United States by 18 U.S. Code Section 1257 (2).

d) Cases believed to sustain the jurisdiction of the United States Supreme Court are:

Jamison vs. Texas, 318 U.S. 413, 414 (1943);

King Mfg. Co. vs. City Council of Augusta, 277 U.S. 100 (1928);

Lehon vs. City of Atlanta, 242 U.S. 53 (1916);

Lovell vs. Griffin, 303 U.S. 444, 450 (1937);

Poulos vs. New Hampshire, 345 U.S. 395, 402 (1952);

Staub vs. City of Baxley, 355 U.S. 313, 321 (1957).

e) The validity of Sections 17-1 to and including 17-25 of the Code of the City of Rochester Volume I is contested herein. The said sections are contained in Volume I of the Code of the City of Rochester, pages 1701 through and including page 1707. Annexed hereto and made a part hereof is Exhibit B wherein is contained the aforementioned Sections being part of Chapter 17 of the Code of the City of

Rochester, New York, whereby the City of Rochester established the Police Advisory Board. Annexed hereto and made a part hereof and also contained in Exhibit B herein are the Rules of Practice and Procedure of the said Police Advisory Board.

III. QUESTIONS PRESENTED.

1. Whether the ordinance establishing the Police Advisory Board of the City of Rochester is unconstitutional by reason of the fact that the said ordinance constitutes a Bill of Attainder in violation of the United States Constitution Article I Section 10.

2. Whether the ordinance, the rules promulgated thereunder, and the Police Advisory Board's recommendations and decisions are unconstitutional by constituting Bills of Attainder or Bills of Pains and Penalties issued against named American citizens contrary to United States Constitution Article I Section 9.

3. Whether the rulings and determinations of the Police Advisory Board are in fact determinations of criminality for which the accused is entitled to the safeguards and immunities granted by the United States Constitution and the Bill of Rights.

4. Whether the Police Advisory Board is granted a power of issuing general warrants against American citizens, namely police officers, in violation of the Fourth Amendment of the United States Constitution.

5. Whether the procedure of the Police Advisory Board violates the Fifth Amendment of the United States Constitution in compelling testimony of an accused against himself under the threat of the accused's loss of good name or

public employment, and in that various records of the accused individual are made available to the Police Advisory Board without the consent of the accused, which records and testimony have been secured under the threat of the possible loss of public employment.

6. Whether the denial of the right to trial by jury, the denial of the right of confrontation, and compulsory process where the accused is charged with acts that are criminal in nature in the State of New York constitutes a violation of the Sixth Amendment of the United States Constitution.

7. Whether the use of infamy as a means of reprisal for criminal acts against an accused constitutes cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution.

8. Whether the ordinance establishing the Police Advisory Board is unconstitutional by reason of exposing the accused to double jeopardy, deprivation of his right to confront his accusers, deprivation of the right to be tried by an impartial tribunal, deprivation of the right to subpeona witnesses and establish a defense, deprivation of the right to a hearing, deprivation of the right to a public hearing, the deprivation of the right to appeal an adverse decision and the deprivation of the right to be charged under a known and existing law which deprivations constitute a violation of the Fifth and Fourteenth Amendments of the United States Constitution.

9. Whether the ordinance is invalid by reason of vagueness and indefiniteness of the prohibited conduct under the ordinance and therefore violates due process of law under the Fourteenth Amendment of the United States Constitution.

10. Whether the ordinance is an improper exercise of the police power and also constitutes a denial to the equal

protection of the law to members of the police force in violation of the Fourteenth Amendment of the United States Constitution in that the substantive and procedural safe guards available to other citizens are denied to police officers.

11. Whether the public employment of a police officer can be conditioned upon the surrender of constitutional rights which cannot be abridged by direct governmental action.

12. Whether official governmental comment constituting an accusation, condemnation or censure of named individuals is a constitutionally protected criticism under the right of free speech.

IV. STATEMENT OF THE CASE.

On March 26, 1963 the Council of the City of Rochester adopted an ordinance whereby a Police Advisory Board of nine (9) members was established having jurisdiction to investigate complaints alleging "excessive or unnecessary physical force" by members of the Rochester Police Bureau. Although the Board's powers were designated to be advisory in nature the Board in fact had the power to make recommendations after its investigations. The investigations of the Board are conducted in secret and the accused is not entitled to a hearing. If the complaining party demands a hearing, the hearing is held in secret. Although there is a theoretical right of confrontation, the Board does in fact act without the complaining witness being present or being subjected to cross-examination; the accused has no subpeona power; the tribunal is made up of persons who at least appear to be temperamentally hostile to the police and ignorant of police problems; police officers under the procedure of the Police Advisory Board are ac-

cused of acts which are criminal in nature under the laws of the State of New York; the records and transcripts of other departmental proceedings with reference to police misconduct are automatically turned over to the board under the statutory obligation of the Department of Public Safety to "cooperate" with the board. These records are made available despite the fact that they are secured under the threat of the loss of employment of the police officer and he has no means of preventing their being made available to the board. In the event that the city administration of the City of Rochester fails to act in accordance with the "recommendations" of the board then the board is permitted to use publication of its findings and recommendations to coerce the City of Rochester to act in accordance with its dictates. Even if the City of Rochester refuses to act on the dictates of the Board then the publication of the board's findings constitutes a public censure and an accusation of a criminal act of the accused police officer. The police officer has no legitimate tribunal whereby he can objectively contest the findings of this board. He has no tribunal to which to appeal. If the City Administration punishes the officer in accordance with the dictates of the board, then the Civil Service Law of the State of New York governing the employment of civil servants is effectively circumvented. Since the Civil Service Law of the State of New York governs the conduct of public employment in the State of New York, the sole purpose of the Police Advisory Board is not to regulate public employment, but to effect punishment of the accused police officers through a non-judicial tribunal.

On April 22, 1964 a Rochester newspaper published "Policeman Cleared of Brutality Charge By Advisory Board." Furthermore, a complaint against one George Signor was adjudicated by the board in the following manner:

> "Because of the incompleteness of the investigation, due in part to the inability of the complainant to be present at a hearing before the Board, the evidence presented to the Board is inconclusive. Although the evidence adduced is inconclusive, it is of such a character that it cannot be ignored. Therefore, the Board has voted to accept the recommendation of the City Administration that this complaint, it's investigation, and findings, be made a part of your official personnel files." Decision of the Board dated March 17, 1965.

At the present time there is also pending a complaint against one John Hunt, a party to the proceeding herein. There are also several other complaints pending against members of the Rochester Police Force which occurred after the litigation herein was commenced.

It is significant that the only riot in the history of the City of Rochester took place during the period that the Board was in full operation, that is the month of July, 1964. By complaint dated April 14, 1965, the Plaintiffs-Appellants herein commenced suit to declare the ordinance establishing the Board a nullity as violating the Constitution of the United States of America.

Thereafter Judge Jacob Ark by memorandum decision dated December 30, 1965 declared part of the ordinance invalid as violate of the rights of police officers. On January 11, 1968 the Appellate Division, Fourth Department, of the State of New York ruled that the decision of Judge Ark should be reversed and "judgment entered declaring chapter 17 (formerly Chapter 10) of the Code valid and constitutional." Thereafter on June 14, 1968 the Court of Appeals rendered a decision upholding the decision of the Appellate Division upon the opinion of the Appellate Division. The Court of Appeals on September 26, 1968 denied

Plaintiffs-Appellants motion to re-argue the matter of the case herein and granted a motion to amend the remittitur to show that federal questions were necessarily raised and decided by the Court of Appeals. The said amended remittitur is annexed hereto and made a part hereof as Appendix C.

V. THE QUESTIONS ARE SUBSTANTIAL.

A. The Police Advisory Board is not only granted an investigatory power, but also an accusatorial and censorial power against named citizens in violation of Article I Section 10 of the United States Constitution prohibiting Bills of Attainder. See *Lovett vs. United States,* 328 U.S. 303 (1946); *United States vs. Brown,* 381 U.S. 437 (1965).

B. The Police Advisory Board presupposes a power in government to make determinations of criminality of the acts or omissions of certain citizens without a judicial trial, without regard to the substantive and procedural law available to other citizens, and without due process of law in violation of the Fifth Amendment and Fourteenth Amendment of the United States Constitution.

C. No fixed norm or standard of action is prescribed for the police officers nor for the jurisdiction of the Board in violation of the Fourteenth Amendment of the United States Constitution. Culpability is determined solely by the subjective dictates of the inquisitors. *Winters vs. State of New York,* 333 U.S. 507, 515 (1948); *Keyishian vs. Board of Regents,* 385 U.S. 589 (1966). The police officers charged under the ordinance are not only denied of their right to be tried and charged pursuant to the Civil Service Law of the State of New York but they are also denied the right to be tried and charged in the manner that other persons accused of criminal acts are tried and charged. This

constitutes a violation of the equal protection of the laws guaranteed to each citizen by the Fourteenth Amendment of the United States Constitution. The purpose of the ordinance is punishment and procedural safeguards should be available. See *Kennedy vs. Mendoza,* 372 U.S. 144 (1961).

D. Under the statutory duty to "cooperate" the privacy and security of police officers is violated in desregard of the Fourth Amendment of the United States Constitution. See *Camara vs. Municipal Court of City and County of San Francisco,* 387 U.S. 523 (1967). The obligation to turn over civil service records and other records of the police officer together with the general duty on the part of the police officers to "cooperate" constitutes a general warrant against the person and property of the accused police officer in violation of the aforementioned amendment. See *See vs. City of Seattle,* 387 U.S. 541 (1967) and *Berger vs. State of New York,* 388 U.S. 41 (1967).

E. By making available civil service records and testimony secured from police officers through the Internal Inspection Division of the Department of Public Safety, the Police Advisory Board is permitted to secure testimony and evidence of the police officers which can result in not only the censorial judgment of the Board but also may be the basis of criminal prosecution thereafter. This power of the board effectively strips police officers of the constitutional cloak of protection guaranteed to all citizens by the Fifth Amendment. See *Garrity vs. State of New Jersey,* 385 U.S. 493 (1967). The threatened loss of professional standing not only constitutes a form of punishment but also an effective force of governmental compulsion. See *Spevack vs. Klein,* 385 U.S. 511 (1967). The principal against double jeopardy and the right to be accused by a grand jury under the Fifth Amendment are effectively frustrated.

F. In granting the Board a power to determine the criminality of acts without the safeguard of jury trial, the board is able to proscribe the punishment of infamy or require the loss of employment without the accused being granted the right to trial by jury in violation of the Sixth Amendment of the United States Constitution. See *Bloom vs. Illinois,* 20 L. Ed. 2d 522 (1968) and *Application of Gault,* 387 U.S. 1 (1966). In violation of the aforementioned amendment the accused is also denied the right to confront his accuser.

G. The use of public condemnation which could justify private redress for unrequited wrongs can also be considered a form of cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution in that, in effect, citizens are instigated to seek personal vengence rather than the ordinary procedure of law.

H. The Fourteenth Amendment requires at least that basic rules of fairness be used in hearings of charges against citizens. The ordinance establishing the Police Advisory Board does not give the accused a right to a hearing; if a hearing is held at the request of the accuser, the hearing is secret; the accused has no right to subpeona witnesses nor to effectively confront his accuser; after a determination by the inquisitors whom he cannot challenge for bias or prejudice, the accused has no right of appeal; no rule or norm is established protecting police officers from unwarranted charges and accusations; the right to have a attorney present only serves to give an aura of legitimacy to a kangaroo Court; the use of statements derived under governmental compulsion and the ability of the board to comment upon the refusal of police officers to appear before it also effectively undermine the Fifth and Fourteenth Amendments. Instead of trial in an orderly manner, the accused is tried by a committee having no other legitimate

govermental purpose. See *Kilbourn vs. Thompson,* 103 U.S. 168 (1888).

I. Does the right of free speech include in it a power of government to make censorial comment upon the conduct of citizens by reason of the doctrine enunciated in *New York Times vs. Sullivan,* 376 U.S. 254 (1964) without a judicial trial.

The aforementioned issues presented by the ordinance establishing the Police Advisory Board are substantial because they involve the very well springs of governmental power in the government's relationship with the individual citizen. Not only are the rights of police officers as citizens grossly violated, but the effective paralysis of the police force by such a board effectively destroys the primary obligation of government to preserve the life and property of citizens from criminal activity. A further disintegration of respect for law may ultimately result in the destruction of republican government in our nation.

VI. CONCLUSION.

The issue is squarelf presented whether a citizen is stripped of all constitutional rights the moment he dons the uniform of a police officer. Appellants respectfully request that briefs be submitted and the case be argued orally before this tribunal.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF MONROE COUNTY
MEMORANDUM DECISION

(SAME TITLE)

Appearances:

Thomas G. Presutti, Esq., Attorney for the Plaintiff.

Rosario J. Guglielmino, Esq., Attorney for Defendant Police Advisory Board.

John Garrity, Esq., Attorney for the City of Rochester; June Weisberger, of Counsel.

Leo Kesselring, Esq., appearing amicus curiae for The Citizens for Abolition of the Police Advisory Board.

Benjamin Phelosof, Esq., appearing amicus curiae, Genesee Valley Chapter, American Civil Liberties Union.

MEMORANDUM DECISION

This is an action for a declaratory judgment with relation to the legality of the enactment by the Council of the City of Rochester (herein City) of an ordinance establishing a Police Advisory Board (herein Board).

The matter originally came before the court on a motion by the plaintiffs by order to show cause why the defendants should not be enjoined pending the determination of the issues in the action, from conducting hearings, investigations and other acts by the Board. The order to show cause also contained a temporary restraining order. Pending the argument of the motion it was agreed among counsel that the City would move for a summary judgment so that the court could pass upon the merits of the

action and, in the meantime, the temporary restraining order was vacated, except as to plaintiffs John Hunt, Nelson Evans and Joseph Favata, police officers against whom complaints are pending before the Board. The City has moved for summary judgment which is now before the court for decision.

There are two enactments by the City Council involved in this controversy. The creation of a Police Advisory Board (Amendment to Chapter 10 of Volume II of Municipal Code — Department of Public Safety — by adding § 10-10.1 through 10-10.25) under § 521 of Volume I of Municipal Code which authorizes the City Manager to appoint citizen advisory boards as may be authorized by the Council and the amendment of § 387 of Volume I of Municipal Code entitled: "Charges and trials of policemen and firemen."

When this proposed legislation was introduced in the Council the ordinance establishing the Police Advisory Board was apparently referred to the Law Committee and the amendment of §387 was sent to the Public Safety Committee. These committees filed a joint report recommending the adoption of both proposals.

The salient provisions of the ordinance establishing the Board are: (1) The appointment of a nine member board by the City Manager on which no active law enforcement officer may serve; (2) to hear complaints against any member of the Rochester Police Bureau which alleges the use of "excessive or unnecessary physical force against a person or persons", and to recommend such action as the Board thinks appropriate on each complaint; (3) the powers of the Board "are limited to those of an investigative and advisory nature, without any judicial or disciplinary powers"; (4) a copy of the complaint is sent to the Chief of Police who must report to the Board his

findings, recommendations and report of action taken, if any, together with all evidence on which they are based; (5) upon receipt of this report the Board then makes any independent investigation it considers necessary and must hold a private, closed hearing if the aggrieved person makes a written request for such a hearing; (6) the Board then proceeds to evaluate the Chief's report and if it agrees with him, it shall report this fact to the Commissioner of Public Safety, to the City Manager and it shall so advise the complainant and the Chief of Police, and it may make public its argeement with the Chief's findings, recommendations and actions; (7) if it disagrees with the Chief's decision after the evaluation of his report, it shall consult privately with him in an attempt to arrive at a "common conclusion", making available to him all information and evidence in the Board's possession; (8) the Chief shall then have the opportunity to conduct further investigations to properly evaluate any new information or evidence presented to him by the Board; (9) the Chief shall then report the result of his findings to the Board; and (10) if the Board and the Chief are unable to arrive at a "common conclusion", the Board shall report this disagreement along with its findings and all evidence and its recommendations to the Commissioner of Public Safety and the City Manager.

Except for the last section of the ordinance concerning the records and reports of the Board, the enactment concludes with this section:

> "§ 10-10.24—If within two weeks of the receipt of the report of disagreement from the Board to the Commissioner of Public Safety, and the City Manager, action which is satisfactory to the Board has

> not been taken by the City administration, the Board may make public its recommendation to the Commissioner of Public Safety and the City Manager. This act may be done at the public meeting of the Board."

The amendment to § 387 provides that a charge must be signed and verified and set forth the specific act or acts and such other information required by the rules of the Commissioner, and continues as follows:

> "After the filing of the charges, the Commissioner shall cause a preliminary investigation of the charges to be made, and if he finds that there is probable cause for such charges he may order a hearing on said charges. A copy of the charges must be given to the accused person. The hearing may be held by the Commissioner or by a person or persons designated by him who, in the opinion of the Commissioner, is qualified to hold hearings by virtue of his education, experience, or training. If the holding of the hearing has been delegated, the hearing officer or officers shall hear the charges in accordance with the rules of the Commissioner and shall report to the Commissioner for his review and decision."

Prior to the amendment the ordinance provided that the decision of the Commissioner was final and conclusive, but the amendment added the provision that it was "subject only to review by a court of competent jurisdiction."

It is the City's position that "the new ordinance establishing the Police Advisory Board was intended to supplement, complement and be consistent with the provisions of § 387".

The City in its oral argument and in its brief urges that the creation of the Board "was to establish a procedure whereby a distinguished body of citizens would aid the Commissioner of Public Safety in screening written, verified charges brought to the Board's attention, and provide the Commissioner of Public Safety evidence, findings and recommendations to help him determine whether the filed complaint forms a sufficient basis for a departmental disciplinary hearing as authorized by § 387".

This section provides that: "The hearing may be held by the Commissioner or by a person or persons designated by him * * *", but makes no provision for a designation of anyone to conduct the preliminary investigation for probable cause, the role assigned to the Board under the ordinance, according to the City. The fact is that the members of the Board are not the appointees of the Commissioner, as the ordinance establishing it specifically provides that its members are to be, and in fact were, appointed by the City Manager pursuant to § 521 of the Municipal Code. Under §387 the City Manager performs no function as the "decision of the Commissioner is final and conclusive", and by the 1963 amendment to this section, the Commissioner's decision is "subject only to review by a court of competent jurisdiction."

While the Board was created by the Council pursuant to § 521 of the Municipal Code and its members were appointed by the City Manager, there is nothing in § 387 to warrant his participation in a disciplinary proceeding against a police officer, either directly or by means of an agency or board appointed by him.

This section does not provide for the designation of a person or persons by the Commissioner to conduct the

preliminary investigation of the charges for probable cause as it does for the conduct of a hearing on charges after the finding of probable cause. Even if it should be implied that he has such a right, the ordinance has stripped him of this prerogative. Where a hearing by a designee is permitted the failure to obtain written authorization is jurisdictional and fatal to a proceeding. *Matter of Blount v. Forbes,* 250 App. Div. 15, 17. Without a finding of probable cause by the Comissioner there can be no hearing and upon principle it would seem that his participation in the initial step is vital.

It is understandable that the responsibility of making the preliminary investigation be given to the Commissioner who is experienced in police matters. He is in a better position to make a judgment as to what force was necessary under a given set of circumstances and whether the police officer was faced with a situation that gave no time for calm reflection but acted reasonably under the exigency that confronted him . This requires an independent appraisal on his part.

Section 387 is the City's grant of power to discipline a police officer even to the point of dismissing him from service. It is also the employee's right to have the full protection of this statutory provision.

Under the ordinance the public official who is the principal actor is the Chief of Police, who plays no part in the disciplinary proceeding under § 387, unless the Commissioner, in his discretion ,assigns some function to him.

The City furnished to the court, the rules and regulations of the Police Department concerning charges and trials, issued June 1, 1960. They are very meager, con-

sisting of one section of two brief paragraphs concerning charges, and another section consisting of four short paragraphs concerning trials. Nevertheless, they are not inconsistent with § 387, which generally follows § 75 of the Civil Service Law, except that they provide that the Commissioner shall preside at a trial, which is without legal effect by reason of the 1963 amendment.

Under the ordinance, the only role the Commissioner plays is that of being the recipient, together with the City Manager, of the Board's report that it agrees with the Chief's findings, recommendations and actions, or in the event the Board and the Chief of Police are unable to arrive at a common conclusion, the report of this disagreement. In the latter case, as pointed out, the City administration has a period of two weeks in which it may take action satisfactory to the Board, and in the event it fails to do so the Board may make public its recommendations to the Commissioner and City Manager.

If the Board was created for the purpose of assisting the Commissioner in making a determination whether a filed complaint forms a sufficient basis for a departmental disciplinary hearing as stated by the City, the query arises as to how he is assisted by arming the Board with the threat of public confrontation with the City administration when there is a disagreement between the Chief and the Board which is not adjusted to the Board's satisfaction.

The Board in its oral argument and brief maintains that "the ordinance is a constitutionally valid method of criticizing publicly the official conduct of policemen" and frankly states: "What is in issue is the right of the Board to criticize publicly the conduct of policemen." It says that it has no judicial or disciplinary powers, and it is so stated in the

ordinance. Yet, Point I of its brief, however, is devoted to this proposition: "The ordinance is a reasonable regulation for the government and discipline of the police bureau enacted by the City Council which has the authority to enact it and compel obedience by reasonable means."

The Board overlooks the fact that although its membership consists of nine highly respected members of the community, when it makes a public statement it does not speak for them as individuals, but with the authority of an official body of the City of Rochester, N. Y. Its public criticism of a police officer bears the imprimatur of the City of Rochester, N. Y.

This constitutes a reprimand which is defined in Webster's New International Dictionary, 2nd Edition, Unabridged as: "a severe or formal reproof, a censure, esp. one given with authority".

> §387 provides: "If the accused person is found guilty of the charge against him, the Commissioner may punish him by *reprimand,* by forfeiture of pay for some definite time, by a fine not exceeding fifty dollars, by a reduction in grade, or by dismisasl from the force, or may subject him to any other discipline prescribed in the rules promulgated by the Commissioner of Public Safety." (Emphasis supplied).

The Board seeks to do that which can be done only by the Commissioner, after a hearing and a finding of guilt against a police officer:

> "Investigations should not be conducted so that harmful publicity is used in lieu of the sanctions provided by law." (*Excelsior Exterminating & Chemical Co. v. Simon;* 23 Misc 2d 1090, 204 NYS 2d 197, 199).

An exhibit submitted by the Board (G-7) is a letter addressed to plaintiff George A. Signor which concludes with this paragraph:

> "Although the evidence adduced is inconclusive, it is of such a character that it cannot be ignored. Therefore, the Board has voted to accept the recommendation of the City Administration that this complaint, it's investigation, and findings, be made a part of your official personnel files."

It would seem that this violates the police officer's rights under § 387 as it could very likely have an effect upon his service record rating in determining his merit and fitness for promotion as provided under Article 5, § 6 of the State Constitution.

The City urges that the creation of the Board is an additional agency, working with others, in the area of human relations and that the procedures established by the ordinance protect the policeman, the principal beneficiaries of the ordinance, from unsubstantiated charges. On the contrary, the police officers say that they are seeking deliverance from their protector.

The joint report of the Public Safety and Law Committees of the City Council recommending the adoption of the enactments mentions the many problems facing Rochester and other American urban communities. All decent citizens should make their full contribution in the attempt to solve them. This court, however, cannot pass upon the philosophy of a police advisory board toward that end, but only upon its legality.

Memorandum Decision

In *People ex rel. Beck v. Graves,* 280 N.Y. 405, 410, the court held:

> " 'The constitutional validity of law is to be tested, not by what has been done under it, but what may, by its authority, be done.' (*Stuart v. Palmer,* 74 N.Y. 183, 188; *People ex rel. Bernard v. Wemple,* 117 N.Y. 77, 84; *Gilman v. Tucker,* 128 N.Y. 190, 200; *City of Rochester v. West,* 169 N.Y. 510; *Matter of Richardson,* 247 N.Y. 401, 421; *Rosalsky v. State of New York,* 254 N.Y. 117, 121.)"

Although this authority refers to possible consequences of a law, as to the test of its validity, upon the papers before the court it is clear that the functions of the Board have actually become intertwined with the operation of the Department of Public Safety, and particularly the Police Bureau, in violation of the rights of a police officer against whom a complaint was filed.

In *People v. Cook,* 197 App. Div. 155, 162, Affd. 236 N.Y. 505, there is this language:

> "It is a familiar principle that a statute may be unconstitutional in part and valid in part, if the parts which are void can be separated from those which are valid, (*Presser v. Illinois,* 116 U.S. 252; *People ex rel. Devery v. Coler,* 173 N.Y. 103.)"

One of the two concluding paragraphs of the joint report of the Council's Committees contains this pertinent paragraph:

> "In summary, the creation of a Police Advisory Board as proposed in the ordinance, allows complaints to be registered through a non-police agency

while allowing regular police procedures full opportunity to satisfy the complaint."

This expression of the Council's Committees can be given effect by applying the principle of severance in separating the functions of the Board, (*People v. Mancuso,* 255 N.Y. 463, 473) and exscinding the invalid parts of the ordinance. This requires the removal of its power to investigate and recommend action on a complaint as contained in § 10:10.2, the right to investigate as provided in § 10:10.4 and the elimination of §§ 10:10.17-10:10.24 incl. Its Rules of Practice and Procedure should be amended accordingly.

Any matter in the personnel files of a police officer emanating from the Board and not processed in accordance with § 387 of the Municipal Code is to be expunged.

The City's claim that the plaintiffs are estopped from attacking the constitutionality of an ordinance which has been in effect and operation since March 26, 1963, on the ground of laches, is without merit. "* * * [A] public body cannot acquire a non-existent power because resistance to exercise thereof is long delayed." *Board of Higher Ed. of City of New York v. Carter,* 213 N.Y.S. 2d 132, 26 Misc. 2d 989, modified 228 N.Y.S. 2d 704, 16 A.D. 2d 443, reversed in part 250 N.Y.S. 2d 33, 14 N.Y. 2d 138."

Under CPLR 3212(b): "If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross motion."

Judgment in accordance with this memorandum decision.

Dated: December 30, 1965.

JACOB ARK
Justice Supreme Court

ORDER AND OPINION OF THE APPELLATE DIVISION

At a Term of the Appellate Division of the Supreme Court of the State of New York in and for the Fourth Judicial Department, at the City of Rochester, N. Y., commencing on the 8th day of January, 1968.

Present — Hon. Earle C. Bastow, Justice Presiding.
Hon. Harry D. Goldman,
Hon. Frederic T. Henry,
Hon. Frank Del Vecchio,
Hon. John S. Marsh, Associate Justices.

THE LOCUST CLUB OF ROCHESTER, et al.,

Respondents,

vs.

THE CITY OF ROCHESTER,

Appellant,

Henry Gillette, et al.,

Defendants.

The above named City of Rochester, one of the defendants in this action, having appealed to this Court from an order of the Supreme Court, entered in the office of the Clerk of the County of Monroe, on the 2nd day of February, 1966, and said appeal having been argued by Mrs. Ruth B. Rosenberg, of counsel for the appellant, and by Mr. Ronald J. Buttarazzi, of counsel for the respondents, and submitted by Mr. Benjamin Phelosof, of counsel for Amicus Curiae,

American Civil Liberties Union, and due deliberation having been had thereon,

It is hereby ORDERED, That the order so appealed from be, and the same hereby is unanimously reversed on the law and facts, without costs, and judgment is hereby entered as follows: ORDERED and ADJUDGED, That chapter 17 (formerly chapter 10) of the Rochester Municipal Code is valid and constitutional. All findings of fact contained in the Memorandum Decision of the Trial Justice, which are inconsistent with the Opinion herein, are hereby reversed and new findings are hereby made as contained in the Opinion herein, pursuant to CPLR § 5712 (c) 2.

Opinion by Bastow, J., which is hereby made a part hereof.

Enter.

LESTER A. FANNING

Entered: 11th day of January, 1968.

LESTER A. FANNING
Clerk.

OPINION OF THE APPELLATE DIVISION

SUPREME COURT
Appellate Division — Fourth Department

—

THE LOCUST CLUB OF ROCHESTER, et al.,
Respondents,

vs.

THE CITY OF ROCHESTER,
Appellant,

Henry Gillette, et al.,
Defendants.

—

No. 460/1967

ARGUED: October 16, 1967
DECIDED: January 11, 1968

PRESENT:
HON. EARLE C. BASTOW, Justice Presiding.
HON. HARRY D. GOLDMAN,
HON. FREDERIC T. HENRY,
HON. FRANK DEL VECCHIO,
HON. JOHN S. MARSH, Associate Justices.

APPEAL by defendant City of Rochester from Order of Monroe Special Term, Ark, J., granting summary judgment to plaintiffs.

Order entered February 2, 1966.

APPEARANCES:

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Order and Opinion of the Appellate Division

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OPINION

BASTOW, J. P.

Plaintiffs brought this action seeking a declaration as to the validity, legality and constitutionality of an enactment of the Rochester City Council creating a Police Advisory Board. The order appealed from in substance stripped the Board of all the functions granted by the ordinance, except the right to receive and file complaints of the use of excessive or unnecessary force by members of the Rochester Police Bureau.

A proper understanding of the issues presented requires examination of the provisions of the ordinance. The Charter of the City of Rochester (§ 12-31, formerly § 521) authorizes the City Council to establish citizen advisory boards the members of which are appointed by the City Manager. In March, 1963 chapter 10 (now chapter 17) was added to the Code.[1]

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[1] The Code was adopted by the City Council on November 25, 1941. By Local Law No. 4 of 1965 it was re-codified and renumbered. The same law also renumbered the sections of the Charter. Both old and new section numbers will be given herein.

This chapter established a Police Advisory Board (Board) with jurisdiction to consider complaints against members of the police force which alleged "the use of excessive or unnecessary physicial force" by any such member (§ 17-3, formerly § 10-10.3). Its powers are limited to "those of an investigative and advisory nature, without any judicial or disciplinary powers" (§ 17-4, formerly § 10-10.4). After a written complaint has been made to the Board a copy is forwarded to the Chief of Police (§ 17-16, formerly § 10-10.16) who must within 10 days reply thereto with a writing containing his findings, recommendations, report of action taken and the evidence upon which the findings are based (§§ 17-18, 17-19, formerly §§ 10-10.18, 10-10.19). Upon receipt of the Chief's report the Board may make an independent investigation with the right to hold private closed hearings. Such must be held if demanded by the aggrieved party (§ 17-20, formerly § 10-10.20).

The enactment provides differing procedures in a proceeding where the Board agrees with the findings of the Chief of Police from those where the Board disagrees therewith (§§ 17-21 to 17-23, inc., formerly §§ 10-10.21 to 10-10.24). Where there is agreement the Board reports that fact to the Commissioner of Public Safety (Commissioner) and to the City Manager and so advises the Chief of Police and the complainant. If the complaint has received "public notice" the Board may "make public its agreement with the Chief's findings, recommendations and actions."

On the other hand, if the Board disagrees with the decision of the Chief of Police it must consult privately with him in an attempt to arrive at a common conclusion. The

Chief has the right to make a further investigation but if thereafter the disagreement continues the Board must so report to the Commissioner and the City Manager "along with its findings and all evidence on which the findings were based, and its recommendations." Finally, section 17-24 (formerly § 10-10.24) provides that if "action is satisfactory to the Board has not been taken by the city administration" within two weeks from the receipt by the Commissioner and the City Manager of the Board's report of disagreement the latter at a public hearing "may make public its recommendations" to the two city officials.

In January, 1965 the Board adopted a set of rules which set forth in detail regulations for practice and procedure. Among other things, it is provided that the police officer against whom a complaint has been filed is permitted to file a written verified answer to the complaint and to appear in person and by counsel. The hearing is to be private and witnesses are excluded except when giving testimony. These rules were adopted following the receipt of a written opinion from the Corporation Counsel, which advised the Board, among other things, that the respondent police officer had the privilege of asserting his constitutional rights to refuse to appear and if he appeared to assert his privilege against self-incrimination.

Pertinent to the issues presented are the provisions of § 8-34 (formerly § 387) of the City Charter. This is the familiar enactment placing in the Commissioner of Public Safety, authority to investigate a written verified charge made against a police officer, direct a public hearing thereon before himself or his designee and upon a finding of guilt to impose a penalty, among others, of a reprimand.

Special Term in substance concluded (48 Misc 2d 763) that § 17-24 (formerly § 10-10.24) authorizing the Board to

make public its recommendations to the Commissioner and the City Manager in a proceeding where action satisfactory to the Board had not been taken by the city administration fatally invaded the Charter provision authorizing the Commissioner to impose discliplinary penalty in the nature of a reprimand. It was held (p. 770) "that the functions of the Board have actually become intertwined with the operation of the Department of Public Safety, and particularly the Police Bureau, in violation of the rights of a police officer against whom a complaint was filed."

We reach a contrary conclusion. The legislative grant of power to the City Council to establish citizen advisory boards (Charter § 12-31, formerly § 521) was valid. (N.Y. Const. Art. 9, § 2 (c); Municipal Home Rule Law, § 10(1) (i).) In considering the provisions of the Charter (§ 8-34, formerly § 387) vesting in the Commissioner power to discipline police officers and those of Chapter 17 (formerly chapter 10) of the Code creating a Police Advisory Board it must be recognized that when some function "can be fair construction be assigned to both acts, and they confer different powers to be exercised for different purposes, both must stand, though they were designed to operate upon the same general subject" (Woods v. Supervisors, etc., 136 N.Y. 403, 409).

A committee of the Council in recommending adoption of Chapter 10 (now Chapter 17) of the Code wrote in part as follows: "The creation of a Police Advisory Board simply takes cognizance of a feeling, whether warranted or not, among many responsible citizens that adequate channels for communicating grievances involving police action do not exist. Those with public responsibility cannot ignore this feeling. * * * The board will provide a ready and simple outlet for the expression of grievances alleging exces-

sive use of force by police for those of our citizens to whom traditional legal routes of redress are remote or unknown * * * In summary, the creation of a (board) as proposed in this ordinance, allows complaints to be registered through a non-police agency while allowing regular police procedures full opportunity to satisfy the complainant."

Taking a closer look at the crucial section (§ 17-24, formerly § 10-10.24) — where there is disagreement between the Board and the two city officials — the extent of the power of the Board is to make public its "recommendation". In the absence of any disciplinary power vested in the Board it is difficult to imagine a "recommendation" that could exceed one that upon the facts presented some affirmative action should be taken by the city administration. The result would be a plain difference of opinion between city officials and the Board.

We do not share the concern of respondents that thereby some stigma would attach to the officer in question. Neither do we share the view of Special Term that the publicizing of the Board's recommendation would constitute a reprimand that only the Commisisoner may impose.

Special Term to support its view cited an activity of the Board relating to plaintiff, Signor (48 Misc 2d at page 769) and suggested that the action of the Board constituted a violation of the officer's rights under § 387 (now § 8-34) of the Charter. A reading of the quoted portion of the communication of the Board and the background material in the record demonstrates that therein the Board simply voted "to accept the recommendation of the City administration" that the material become part of the officer's personnel files. If this was error (in the absence of filing formal charges before the Commissioner) the error was one of the

city administration and not of the Board. If the officer had been wronged he presumably was entitled to legal redress to clear his personnel file.

We conclude, that fairly construed, the ordinance in no way diminishes, dilutes or infringes upon the statutory power vested in the Commissioner to fix and impose punishment for misconduct or dereliction of duty by a police officer. The limited right granted to the Board to make public its findings, in a proceeding where there is disagreement between it and the responsible city officials, would not constitute a "reprimand" within the meaning of the statutory provision vesting in the Commisisoner the right to impose such a penalty. At most such publication might result in direct or implied criticism of the police officer but it is difficult to conclude that such criticism would infect the official record of the officer if the responsible city officials (Chief of Police, City Manager and Commissioner) had concluded that there was no merit to the complaint pending before the Board.

In any event, we are here construing the provisions of an ordinance and the spirit and purpose of the enactment and the objectives sought to be accomplished by the City Council must be borne in mind. (Cf. Matter of New York Post v. Leibowitz, 2 N Y 2d 677, 685.) That legislative body was attempting to strike a balance between the rights of the police officer and the rights of the citizen. To quote again from the report recommending adoption of the ordinance: "The board should contribute to rather than impair, the efficiency of police performance of allowing grievances, some real, some imagined, to be considered by a responsible body of citizens, rather than remain, as they often do, smoldering

embers of mistrust and contention between police and citizens."

If the most grievous thing that could happen to a police officer by publication of the recommendations of the Board would be criticism, direct or implied, we conclude that this would not be sufficient reason to strike down the ordinance. Policemen, like judges are forced to make unpopular decisions and it has been written that "Judges are supposed to be men of fortitude, able to thrive in a hardy climate." (Craig v. Harney, 331, U.S. 367, 376). "In a democratic society, one who assumes to act for the citizens in an executive, legislative or judicial capacity must expect that his official acts will be commented upon and criticized" (Goldberg and Douglas, JJ. concurring in New York Times Co. v. Sullivan, 376 U.S. 254, 299, 84 S. Ct. 710, 736).

We have examined the other contentions advanced by respondents and find them to be without merit. The order should be reversed and judgment entered declaring chapter 17 (formerly chapter 10) of the Code valid and constitutional.

Goldman, Henry, DelVecchio and Marsh, JJ., concur.

OPINIONS OF THE COURT OF APPEALS

Court of Appeals of New York
June 14, 1968

THE LOCUST CLUB OF ROCHESTER, JOHN HUNT, BENNIE JASKOT, GEORGE SIGNOR, RICHARD STERLING, ANTHONY D'ANGELO, NELSON EVANS and JOSEPH FAVATA, all having offices or residing in the City of Rochester, County of Monroe and State of New York,

Appellants,

vs.

THE CITY OF ROCHESTER, HENRY GILLETTE, FRANK LAMB, RAYMOND LILL, WILLIAM MALOY, JR., WILLIAM J. MALLEY, MARIO PIRRELLO, WILLIAM LEGG, PETER BARRY and HYMAN FREEMAN, as Members of the Common Council of the City of Rochester; THE POLICE ADVISORY BOARD and DR. KENNETH W. WOODWARD, RABBI HERBERT BRONSTEIN, DR. WILLSON H. COATES, EDGAR S. LAMBERT; JAMES S. MALLEY, THE REV. DONALD J. MULCAHY, THE REV. JAMES A. ROCKWELL, ANTHONY R. SCHNEIDER and ROSS GUGLIELMINO, as Members of the Police Advisory Board, all having offices or residing in the County of Monroe and the State of New York,

Respondents.

PER CURIAM.

Order affirmed, without costs, on the opinion at the Appellate Division.

FULD, C. J., and BURKE, BERGAN, KEATING, BREITEL and JASEN, JJ., concur.

SCILEPPI, J., dissents and votes to reverse in the following opinion.

SCILEPPI, Judge (dissenting).

This action was commenced by the Locust Club of Rochester, a police organization composed of individual policemen employed by the Rochester Police Bureau, to test the legality and constitutionality of a municipal ordinance enacted by the Council of the City of Rochester establishing a Police Advisory Board. I do not reach the constitutional questions presented by the appellants since it is my opinion that the ordinance in question is in direct conflict with section 351 and section 387 of the Charter of the City of Rochester and it is, therefore, invalid.

Section 351 of the Rochester City Charter provides: "The commissioner of public safety * * * shall hear and decide all charges of misconduct and incompetence made against any officer or member of the police and fire forces or of any bureau or division within his jurisdiction, and in all such cases shall have the power to issue subpoenas and administer oaths * * *. He shall have exclusive control of the administration of the police force" (emphasis added).

Section 387 of the charter implements the above-quoted provisions of section 351. It provides: "CHARGES AND

TRIALS OF POLICEMEN AND FIREMEN. If a charge be made by any person against any officer or member of the police or fire force, that he has been guilty of neglect of duty, or negligent or derelict in the performance thereof, or guilty of misconduct in his office, or that he is incompetent to perform the duties thereof, or that he is incapacitated by age or disease or infirmity to properly discharge the duties thereof, or that he is guilty of some delinquency or misconduct showing an unfitness for office or that he has violated the rules of the commissioner of public safety, the charge must be in writing, signed and verified by the person bringing the charge, and must set forth the specific act or acts that are the subject matter of the charge, and must contain such other information required by the rules of the Commissioner of Public Safety. After the filing of the charges, the Commissioner shall cause a preliminary investigation of the charges to be made, and if he finds that there is probable cause for such charges he may order a hearing on said charges. A copy of the charges must be given to the accused person. The hearing may be held by the Commissioner or by a person or persons designated by him who, in the opinion of the Commissioner, is qualified to hold hearings by virtue of his education, experience or training. If the holding of the hearing has been delegated, the hearing officer or officers shall hear the charges in accordance with the rules of the Commissioner and shall report to the Commissioner for his review and decision. The accused person has the right to be heard in person and by counsel, and to give and furnish evidence in his defense. All trials are open to the public. The Commissioner has power to issue subpoenas under his name and official title

to compel the attendance of witnesses upon any hearing, and any person duly served with a subpoena is bound to attend in obedience to the command thereof. If the accused person is found guilty of the charge against him, the Commissioner may punish him by reprimand, by forfeiture of pay for some definite time, by a fine not exceeding fifty dollars, by a reduction in grade, or by dismissal from the force, or may subject him to any other discipline prescribed in the rules promulgated by the Commissioner of Public Safety. The Commissioner may summarily dismiss from the force any person failing or neglecting to pay within the time or times prescribed by the Commissioner, a fine imposed by him. The decision of the Commissioner is final and conclusive, subject only to review by a court of competent jurisdiction'' (emphasis added).

If this Police Advisory Board were truly advisory in nature and function, I would have no quarrel with it, for section 521 of the Rochester City Charter authorizes the City Manager to appoint civilian advisory boards. An analysis of the authority and functions of the Police Advisory Board, however, demonstrates that it substantially interferes with the internal administration of the Rochester Police Bureau.

Section 10-10.16 of the Code of the City of Rochester authorizes the board to forward any complaint which charges a police officer with the use of excessive force to the Chief of Police. The Chief of Police must investigate the complaint and he must report his findings to the board within 10 days of receipt of the complaint (Code of the City of Rochester, Sec. 10-10.18). I fail to see how it can be said that the Commissioner of Public Safety has exclusive jurisdiction over the administrative affairs of his department

when a civilian advisory board can command the Chief of Police to conduct a preliminary investigation and report his findings to the board.

After the Chief of Police reports back to the board, the board is authorized to conduct further investigation and to hold private closed hearings (Code of City of Rochester, Sec. 10-10.20). Section 387 of the Rochester Charter authorizes only the Commissioner of Public Safety or his designate to hold hearings. It also provides that such hearings shall be open to the public.

Under the ordinance, if the board disagrees with the Police Chief's findings, recommendations and actions, it shall consult privately with him in an attempt to arrive at a common conclusion. If the board exists merely to receive complaints and to advise the Commissioner of Public Safety, it is impossible to justify any attempt to arrive at common conclusions where disagreements exist between the board and chief.

To aggravate matters, if the board and the chief cannot arrive at a common conclusion, the board is authorized to report this disagreement to the Commissioner of Public Safety and the City Manager (Rochester City Code, Sec. 10-10.23). If the city administration does not take action which is satisfactory to the board within two weeks of the receipt of the report of disagreement, the board may publicize its disagreement and its recommendations (Rochester City Code, Sec. 10-10.24). In fact and in effect, this is far from mere advisory action.

If the board were truly advisory, it would merely present its recommendations to the Commissioner of Public Safety who would then have the right to accept or reject them. Its

role would extend no further than this. Here, however, if the board is not satisfied with the Commissioner's actions, it is authorized to become his adversary and to resort to the forum of public opinion in an attempt to impose its view on the commissioner. Not only is this contrary to the concept of an advisory board, but it is an unwarranted and invalid intrusion upon the exclusive jurisdiction of the Commissioner of Public Safety to administer the internal affairs of his department.

Accordingly, I would reverse the order of the Appellate Division and reinstate the order of the Supreme Court, Monroe County.

Order affirmed, etc.

APPENDIX B
CODE OF THE CITY OF ROCHESTER
Volume I, Chapter 17

Code of the City of Rochester, Volume I, Chapter 17 provides as follows:

§ 17-1. Appointment to Board.

The Police Advisory Board will be a nine (9) member board appointed by the City Manager pursuant to § 12-31 of the Charter of the City of Rochester for three (3) year overlapping terms. Of the members first appointed, three (3) shall be for one (1) year terms, three (3) shall be for two (2) year terms, three (3) shall be for three (3) year terms; thereafter, all members shall be appointed for three (3) year terms. Residence within the City of Rochester is

not a requirement for Board membership. No active law enforcement officers may serve as Board members.

§ 17-2. Purpose of Board.

The purpose of this Board is to hear complaints of citizens against any member of the Rochester Police Bureau for alleged acts which fall within the Board's jurisdiction, to investigate these complaints, and to recommend such action as the Board thinks appropriate on each complaint.

§ 17-3. Jurisdiction of Board.

The jurisdiction of the Board is limited to consideration of complaints against any member of the Rochester Police Bureau, which complaint alleges the use of excessive or unnecessary physical force by a member of the Rochester Police Bureau against a person or persons.

§ 17-4. Powers of Board.

The powers of this Board are limited to those of an investigative and advisory nature, without any judicial or disciplinary powers.

§ 17-5. Quorum.

In order for the Board to conduct Board affairs, a quorum of six (6) members will be required, and a vote of five (5) members present in person at any meeting will be required for Board action.

§ 17-6. Cooperation with Board.

All city officers and employees are hereby directed to cooperate with the Board in carrying out its duties.

§ 17-7. Meetings of Board.

All meetings of the Board will be conducted in executive session in accordance with the rules and regulations adopted by the Board not in conflict with the provisions of this ordinance, unless exceptions to this are provided within this ordinance. The conduct of Board business and of the Board staff will be conducted privately unless otherwise noted in this ordinance.

§ 17-8. Public meetings.

The Board may hold public meetings for the purpose of electing officers and adopting rules and regulations to govern its operations.

§ 17-9. Paid staff.

The Board will have the power to appoint a paid staff within the budgetary limitations of any appropriating ordinance adopted by the City Council from time to time for the operation of said Board.

§ 17-10. Effective date of jurisdiction.

The jurisdiction of this Board will commence as of the effective date of this ordinance. Any incident alleged to have happened prior to the date of the adoption of this ordinance shall not be within the jurisdiction of this Board.

§ 17-11. Complaints to be filed within ninety days.

All complaints must be in writing and signed by the person making the complaint. The complaint must be filed with the Board within ninety (90) days of the date of the

occurence complained about except in the case where the Board agrees to an extension of this time because of hardship. Hardship shall be in the nature of an incapacity to file a report with the Board, in which case the complaint must be filed within thirty (30) days after the termination of the incapacity to file.

§ 17-12. Filing of complaints.

The Board will receive complaints from any person who believes himself aggrieved, or from any other person on behalf of the aggrieved person who authorizes the filing of a complaint on his behalf. The term "person" when used in this ordinance, shall not include any corporation, association, organization, agency, or governmental unit. The term "aggrieved person" when used in this ordinance shall mean the actual individual who was personally and physically involved in the incident where there is alleged to have been the use of excessive or unnecessary force by a member or members of the Rochester Police Bureau. In the event of mental incompetency, infancy, or death of the aggrieved person, the Committee or legal representatives of the aggrieved person may file a complaint in the place of the aggrieved person, in which event the verification may be made upon information and belief, rather than personal knowledge by said Committee or legal representative.

§ 17-14. Forms used in making complaints.

The written complaint shall be on forms furnished by the Board. The complaint to be within the Board's jurisdiction, must set out in concise language the following information:

A. The name and address of the aggrieved person;

B. The date, the specific location, and the approximate time of day where and when the alleged incident occurred;

C. The number of persons involved in the incident, their names and addresses if known, or if not known, such other information as will assist the Board to identify all participants;

D. The specific injuries or damages sustained by the aggrieved person;

E. The names and addresses of any known witnesses to the incident;

F. Such other information that might assist the Board in making a complete investigation of the incident;

G. Such other information that the rules and regulations of the Board may require.

§ 17-14. Filing by aggrieved person.

If the aggrieved person files the complaint, the complaint must be signed and verified by the aggrieved individual.

§ 17-15. Filing on behalf of aggrieved person.

If the complaint is filed on behalf of the aggrieved person, the staff of the Board will be responsible for making every reasonable attempt to secure verification from the aggrieved individual.

§ 17-16. Copy to Chief of Police.

Whether the complaint is verified or not, an exact copy thereof shall be forwarded as soon as posible to the Chief of Police by the staff of the Board.

§ 17-17. No action required of complaint not signed and verified.

If the complaint is not signed and verified by the aggrieved person within ten (10) days of its original filing with the Board, no further action shall be required in the way of a report from the Chief of Police to the Board, and the Board shall take no further action thereon.

§ 17-18. Chief of Police to report within ten days.

If the complaint is signed and verified by the aggrieved person and deals with a subject matter that is within the jurisdiction of the Board, the Chief of Police must report his findings on the complaint to the Board within ten (10) days of receipt of the verified complaint from the Board. If the Chief of Police is unable to complete his investigation within that period of time, the Chief of Police shall file an interim progress report. In any event, the Chief must file with the Board a final report within a reasonable period of time.

§ 17-19. Chief of Police's report.

The Chief of Police's report to the Board shall contain all evidence on which he has based his findings. The Chief's report shall contain his findings, his recommendations, and report of action taken, if any.

§ 17-20. Independent investigation by Board.

Upon receipt of the Chief's report, the Board, with the assistance of the staff shall make any independent investigation it considers necessary, including the right to take statements from witnesses and the right to hold private, closed hearings. The Board must hold a private, closed hearing if the aggrieved person makes a written request for such a hearing at the time of or after the filing of a signed and verified complaint in accordance with the provisions of this ordinance.

§ 17-21. Evaluation of Chief of Police's report.

The Board shall then proceed to evaluate the Chief of Police's report. If the Board finds that it agrees with the Chief's findings, recommendations, and actions, the Board shall report this to the Commissioner of Public Safety and to the City Manager and shall so advise the complainant and the Chief of Police. If the complaint has received public notice, the Board may, in addition, make public its agreement with the Chief's findings, recommendations, and actions. If the Board finds that it disagrees with the Chief's decision after evaluation of his report, it shall consult privately with the Chief of Police in an attempt to arrive at a common conclusion. In so doing, the Board must make available to the Chief of Police all information and evidence it has in its possession concerning the complaint. Following consultation between the Chief of Police and the Board, the Chief of Police shall have the opportunity to conduct further investigations to properly evaluate any new information or evidence presented to him by the Board. The Chief of Police shall promptly report the results of his findings to the Board.

§ 17-22. Board report when concurring with Chief of Police.

If the Board and the Chief of Police arrive at a common conclusion, the Board will report this fact along with findings and agreement to the Commissioner of Public Safety and to the City Manager and will so advise the complainant and the Chief of Police. If the complainant had received public notice, the Board may, in addition, make public its agreement with the Chief's findings, recommendations and actions.

§ 17-23. Board report when in disagreement with Chief of Police.

If the Board and the Chief of Police are unable to arrive at a common conclusion, the Board shall report this disagreement along with its findings and all evidence on which the findings were based, and its recommendations to the Commissioner of Public Safety and the City Manager.

§ 17-24. Public announcement of recommendations.

If within two (2) weeks of the receipt of the report of disagreement from the Board to the Commissioner of Public Safety, and the City Manager, action which is satisfactory to the Board has not been taken by the city administration, the Board may make public its recommendation to the Commissioner of Public Safety and the City Manager. This act may be done at the public meeting of the Board.

§ 17-25. Keeping of records, quarterly reports.

The Board shall keep a record of all complaints and disposition thereof. The Board shall file a quarterly report with the City Manager showing the general activity of the Board. This report is to be made public.

APPENDIX B
RULES OF PRACTICE AND PROCEDURE

City of Rochester, N.Y.
Police Advisory Board
34 State Street
Rochester, N.Y. 14614

Dr. Kenneth W. Woodward, Chairman

Rabbi Herbert Bronstein
Dr. Willson H. Coates
Edgar S. Lambert
James S. Malley
The Rev. Donald J. Mulcahy
The Rev. James A. Rockwell
Anthony R. Schneider

Ross Guglielmino, Executive Director and Legal Counsel

RULES OF PRACTICE AND PROCEDURE

By virtue of the authority vested in it by CH. 10-10.1 to CH. 10-10.25 of Volume II of the Municipal Code, the Board adopted the following Rules of Practice and Procedure on *January 25, 1965.*

PART I. DEFINITIONS.

The terms used in these rules shall have the meaning defined unless other meaning is clearly apparent in language or context:

a. *Aggrieved person,* is the individual who was personally and physically injured or killed in the incident where it is alleged unnecessary or excessive force was used.

b. *Complainant,* is the person who files the complaint before the Board.

c. *Respondent,* is the member of the Rochester Police Bureau against whom a complaint has been filed before the Board.

d. *Board,* is the Police Advisory Board of the City of Rochester.

e. *Quorum,* for the conduct of Board affairs shall consist of the presence in person of six members at any meeting thereof, and the vote of five members present shall be required for Board action; however, the presence of five members in person, with all of them concurring, shall be sufficient to take action on any informal complaint.

f. *Party,* is either the complainant or respondent.

g. *The Ordinance,* shall mean the Municipal Ordinance of the City of Rochester, N. Y., establishing the Police Advisory Board, as amended, Vol. 11 of the Municipal Code, CH. 10-10.1 to CH. 10-10.25.

h. *Police Bureau,* is the City of Rochester Police Bureau.

i. *Hearing Panel* shall mean the three members of the Board designated by the Chairman to conduct a hearing and the legal counsel to the Board.

j. *Chief,* shall mean the Chief of Police of the City of Rochester Police Bureau.

k. *Formal Complaint* shall mean any complaint filed with the Board by an authorized person against a member of the Police Bureau alleging the use of excessive or unnecessary physical force. Should the complaint, in addition, allege other police misconduct, the Board's jurisdiction shall be limited solely to consideration of those portions of the com-

plaint alleging unnecessary or excessive physical force.

l. *Informal Complaint,* shall mean any complaint against a member of the Police Bureau filed with the Board which does not qualify as a formal complaint. The Board's jurisdiction in respect of informal complaints shall be limited to receiving the complaint, reducing it to writing, and mailing a copy thereof to the chief and to the City Manager.

m. *The Chief's Report* shall mean the complete investigation of the complaint, findings and supporting evidence, including interim progress report and all supplements thereto, prepared by the Chief for the Board.

PART II. FORMAL COMPLAINTS

Sec. 1. *WHO MAY FILE.*

a. Formal complaints against a member of the Rochester Police Bureau alleging the use of unnecessary or excessive physical force may be filed by any person who believes himself aggrieved or by any other person whom he authorizes. It may not be filed by a corporation, organization or governmental unit.

b. The Complaint of an infant, incompetent or deceased person may be filed in his behalf by his parent, person in *loco parentis,* guardian, committee or legal representative.

Appendix B — Rules of Practice and Procedure

Sec. 2. *FORM OF COMPLAINT*

The Complaint shall be in writing on forms furnished by the Board, and must be signed by the complainant. It shall contain the following information:

a. The name, age, address, phone number and place of employment of complainant; the name and address of his attorney, if any.

b. The name, age, address, phone number, occupation and place of employment of the aggrieved person.

c. The names, badge numbers, and addresses of the respondents, or if they are unknown, such information as will enable the Board to identify them.

d. The date, time and place where the injuries to the aggrieved person were sustained.

e. The specific injuries or damages sustained by the aggrieved person.

f. A statement with particularity of the incident resulting in the injuries.

g. The names and addresses of all known witnesses to the incident.

h. A statement of any outstanding criminal charges against the aggrieved person.

i. A statement of any other action, civil or criminal taken or contemplated by or on behalf of the aggrieved person, arising out of the same grievance alleged in the complaint and the present status of such action.

Sec. 3. *VERIFICATION OF COMPLAINT*

All complaints shall be verified before a person duly authorized by law to take oaths.

a. The complaint filed by the aggrieved person shall be verified by him.

b. The complaint filed on behalf of an aggrieved person shall be signed by the complainant, and thereafter shall be verified by the aggrieved person.

c. The complaint filed on behalf of an infant, incompetent or deceased person shall be verified by the complainant on information and belief.

Sec. 4. *PLACE AND TIME OF FILING*

a. A complaint shall be filed with the executive Director of the Board at the Board's office.

b. It shall be filed within 90 days of the occurrence out of which the complaint arose, unless the time is extended by the Board.

c. When the aggrieved person is prevented from timely filing of his complaint because of his incapacity, the Board may extend his time to file, but in no event beyond thirty days after termination of his incapacity.

Sec. 5. *WITHDRAWAL OF COMPLAINT*

A complaint may be withdrawn only with the consent of the Board.

Sec. 6. *EFFECT OF OTHER ACTIONS PENDING ORIGINATING FROM SAME GRIEVANCE.*

The pendency of other actions or proceedings either civil or criminal, originating from the same grievance which is the subject of the complaint before the Board shall have the following effects:

a. A criminal proceeding against the respondent, shall result in postponement of any decision by the Board until final determination of the criminal proceeding. It shall not, however, be a bar to full investigation of the complaint by the Chief and the Board. In such case, the complete file of the Board shall remain confidential and not be disclosed to either party.

b. A criminal proceeding against the aggrieved person shall have no effect, except that he may request in writing postponement of the decision of the Board until final determination of the criminal proceeding.

c. The filing of a Notice of Claim or the commencement of a civil action seeking damages against the City of Rochester started by the aggrieved person, or in his behalf, or the filing of a Notice of Claim or commencement of a civil action by any other aggrieved person whose claim arises out of the same grievance, shall result in postponement of the decision by the Board, until final determination of the action. In such case the complete file of the Board shall remain confidential and shall not be disclosed to either party.

d. A civil action seeking damages started by respondent shall have no effect.

PART III. HEARINGS

Sec. 1. *WHEN HELD*

A hearing on a complaint shall be held when ordered by the Board. It must be held when the aggrieved person makes a written request for one. Request for a hearing must be made in writing filed with the Board at its office at any time prior to final decision of the Board.

Sec. 2. *APPEARANCES*

The aggrieved person shall be present in person and may be represented by attorney. The respondent may appear in person and by counsel. If the aggrieved person or respondent cannot afford counsel of his own chosing, the Board will endeavor to obtain the services of a member of the Monroe County Bar Association to represent him without compensation.

Sec. 3. *HEARING PRIVATE*

The hearing shall be private and witnesses shall be excluded from the hearing room except when giving testimony. In addition to the Hearing Panel, the parties, their counsel and the hearing stenographer, the following shall be entitled to attend: all other members of the Board, the City Manager, the Corporation Counsel, the Commissioner of Public Safety, the Chief, or one authorized representative of each.

Sec. 4. *WHO SHALL CONDUCT*

Hearings shall be conducted by a Hearing Panel of three members of the Board designated by the Chairman who shall designate one of these as the presiding member. The Legal Counsel of the Board shall sit with the Hearing Panel.

Sec. 5. *PLACE*

Hearings shall be held at a time and place designated by the Board, having due regard to the convenience of the parties and witnesses.

Sec. 6. *NOTICE OF HEARING*

At least 15 days before the date of hearing, a notice of hearing stating the time and place of hearing, and a copy of the verified complaint and amendments thereto, shall be served on all the parties by certified mail, return receipt requested. The notice to the aggrieved person shall contain a statement that he must respond to the notice not less than 5 days prior to the hearing date, indicating his intention to be present at the hearing in person, and that failure so to respond will result in dismissal of the complaint, unless, upon timely response to the notice, for good cause shown, the Board grants him a postponement or rescheduling of the hearing.

A copy of the Notice of Hearing shall also be sent by ordinary mail to the City Manager, the Commissioner of Public Safety, the Corporation Counsel and the Chief.

Sec. 7. *ANSWER*

The respondent upon whom a notice of hearing and a copy of the complaint has been served, may file a written verified answer in person or by attorney within six days from the date of service of such notice of hearing.

Sec. 8. *PLACE AND MANNER OF FILING*

The answer must be filed in duplicate at the office of the Board. It may be filed by personal service or by certified

mail, return receipt requested. One copy of the answer shall be served by the Board, personally or by certified mail, return receipt requested, upon the complainant or his attorney.

Sec. 9 *FORM OF ANSWER*

The answer shall be in writing, and shall be verified by the respondent. It shall contain the post-office address of the respondent, the name and post-office address of his attorney, if he has one, a general or specific denial of each material allegation of the complaint controverted by the respondent, or a denial of any knowledge or information thereof sufficient to form a belief and a statement of any matter constituting a defense.

Sec. 10 *DISCLOSURE AND CONFIDENTIALITY OF BOARD'S FILES*

Except as prohibited elsewhere by these rules, the Board shall disclose to the parties the following:

a. The complaint and any amendments thereto.

b. The answer and any amendments thereto.

c. The aggrieved person's statement taken as part of the Chief's investigation.

d. The respondent's statement taken as part of the chief's investigation.

No other parts of the Boards files shall be disclosed to the parties.

Sec. 11. *HEARING PROCEDURE*

a. The Hearing Panel shall not be bound by the strict rules of evidence prevailing in courts of law or equity and

may receive such evidence as seems to them equitable and proper.

b. The proceedings shall be conducted by the presiding member, but the other members shall have the right to ask questions and seek information individually.

c. The Legal Counsel to the Board shall sit to the left of the presiding member. He shall rule on all questions of procedure and the admissibility of evidence.

d. All oral testimony shall be given under oath or affirmation.

e. A stenographic record of the proceeding shall be made and kept. It shall first show the time and place of the hearing, the names of the Hearing Panel, its presiding member, and other members of the Board who are present, the Board Counsel, the parties and their attorneys.

f. The aggrieved person or his attorney shall then present his case, call his witnesses, and present his proof, then submit to cross examination by respondent or his Counsel and by members of the Hearing Panel.

g. The respondent or his Counsel shall then present his defense, call witnesses and present his proofs and then similarly submit to cross examination and questions by the Hearing Panel.

h. Exhibits offered by either party may be received by the Board.

i. All proofs shall be taken in the presence of the parties and their counsel, but the hearing may proceed in the absence of either party, if by his own fault, after due

notice, he fails to be present or fails to obtain an adjournment for a valid reason.

j. If the Hearing Panel deems it necessary to make any inspections or obtain proofs or make any inquiries outside of the hearing, the parties may authorize that the Hearing Panel make such inspection or inquiries or obtain such proofs in the absence of parties.

Sec. 12. *WRITTEN TRANSCRIPT OF THE RECORD*

The written transcript of the record upon the hearing before the panel shall consist of the verified complaint, the notice of hearing, the verified answer, and any amendment thereto, the stenographic transcript of the testimony taken at the hearing, the exhibits and depositions in evidence.

Sec. 13. *DECISION OF THE BOARD AFTER A HEARING*

The decision of the Board shall be made by a vote of five members present in person at a meeting of the Board in which a quorum is present. It shall be made after a review of the written transcript of the record of hearing, the chief's report, interim report and supplemental reports, his findings, recommendations and action.

The Board shall exclude from its deliberations all statements of witnesses not made under oath, other than the statements of the parties themselves, and official reports of the incident involved in the complaint.

The Board's decision shall be in the form of a written opinion containing the reasons therefor.

EXHIBIT B
CODE OF THE CITY OF ROCHESTER
Volume I, Section 8-34

Code of the City of Rochester, Volume I, Section 8-34, provides as follows:

Charges and trials of policemen and firemen.

If a charge be made by any person against any officer or member of the Police or Fire Force, that he has been guilty of neglect of duty, or negligent or derelict in the performance thereof, or guilty of misconduct in his office, or that he is incompetent to perform the duties thereof, or that he is incapacitated by age or disease or infirmity to properly discharge the duties thereof, or that he is guilty of some delinquency or misconduct showing an unfitness for office, or that he has violated the rules of the Commissioner of Public Safety, the charge must be put in writing signed and verified by the person bringing the charge, and must set forth the specific act or acts that are the subject matter of the charge, and must contain such other information required by the rules of the Commissioner of Public Safety. After the filing of the charges, the Commissioner shall cause a preliminary investigation of the charges to be made, and if he finds that there is probable cause for such charges he may order a hearing on said charges. A copy of the charges must be given to the accused person. The hearing may be held by the Commissioner or by a person or persons designated by him who, in the opinion of the Commissioner, is qualified to hold hearings by virtue of his education, experience, or training. If the holding of the hearing has been delegated, the hearing officer or officers shall hear the charges in accordance with the rules of the Commissioner and shall report to the Commissioner for his review and decision. The accused person has the right to

be heard in person and by council, and to give and furnish evidence in his defense. All trials are open to the public. The Commissioner has power to issue subpoenas under his name and official title to compel the attendance of witnesses upon any hearing, and any person duly served with a subpoena is bound to attend in obedience to the command thereof. If the accused person is found guilty of the charge against him, the Commissioner may punish him by reprimand, by forfeiture of pay for some definite time, by a fine not exceeding fifty dollars ($50.) by a reduction in grade, or by dismissal from the force, or may subject him to any other discipline prescribed in the rules promulgated by the Commissioner of Public Safety. The Commissioner may summarily dismiss from the force any person failing or neglecting to pay within the time or times prescribed by the Commissioner, a fine imposed by him. The decision of the Commissioner is final and conclusive, subject only to review by a court of competent jurisdiction.

EXHIBIT C
SUPREME COURT OF MONROE COUNTY ORDER, DATED NOVEMBER 8, 1968

STATE OF NEW YORK — SUPREME COURT
County of Monroe

THE LOCUST CLUB OF ROCHESTER, JOHN HUNT, BENNIE JASKOT, GEORGE SIGNOR, RICHARD STERLING, ANTHONY D'ANGELO, NELSON EVANS and JOSEPH FAVATA, all having offices or residing in the City of Rochester, County of Monroe and State of New York,

Appellants,

vs.

THE CITY OF ROCHESTER, HENRY GILLETTE, FRANK LAMB, RAYMOND LILL, WILLIAM MALOY, JR., WILLIAM J. MALLEY, MARIO PIRRELLO, WILLIAM LEGG, PETER BARRY and HYMAN FREEMAN, as Members of the Common Council of the City of Rochester; THE POLICE ADVISORY BOARD and DR. KENNETH W. WOODWARD, RABBI HERBERT BRONSTEIN, DR. WILLSON H. COATES, EDGAR S. LAMBERT, JAMES S. MALLEY, THE REV. DONALD J. MULCAHY, THE REV. JAMES A. ROCKWELL, ANTHONY R. SCHNEIDER and ROSS GUGLIELMINO, as Members of the Police Advisory Board, all having offices or residing in the County of Monroe and the State of New York,

Respondents.

INDEX NO. 2633/65

A motion for reargument and to amend the remittitur in the aboye case having heretofore been made upon the

part of the Plaintiffs-Appellants herein, and the papers having been submitted thereon and due deliberation having been thereupon had and the Court of Appeals having ruled denying the motion and amending the remittitur as per the annexed Order of the Court of Appeals dated September 26, 1968, it is

ORDERED that the said Order of the Court of Appeals denying said motion for reargument and amending the said remittitur be and hereby is made and accepted as the Order of this Court.

November 8, 1968

/s/ DANIEL E. MACKEN

ORDER DATED SEPTEMBER 26, 1968

STATE OF NEW YORK — COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-sixth day of September A. D. 1968.

PRESENT, Hon. Stanley H. Fuld, *Chief Judge, presiding.*

4 Mo. No. 740

The Locust Club of Rochester, et al.,

Appellants,

vs.

The City of Rochester,

Respondents.

A motion for reargument and to amend the remittitur in the above cause having heretofore been made upon the

part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks reargument, be and the same hereby is denied, and it is

ORDERED, that the said motion, insofar as it seeks amendment of the remittitur, be and the same hereby is granted. The return of the remittitur is requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Plaintiffs argued that the ordinance creating the Police Advisory Board violated due process requirements in that the standards or norms of action were indefinite and vague; denied equal protection under the law to police officers; permitted Bills of Attainder contrary to Article I of the Constitution; and violated the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the Constitution. This court held that plaintiffs' constitutional rights were not violated.

AND the Supreme Court of Monroe County hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

/s/ GERRON KIMBALL
Deputy Clerk

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In The

Supreme Court of the United States

October Term, 1968

No. 799

THE LOCUST CLUB OF ROCHESTER, et al.,
Appellants,

v.

THE CITY OF ROCHESTER, et al.,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLEES' MOTION TO DISMISS

—

Motion to Dismiss

Appellees in the above-entitled case move to dismiss on the ground that the questions presented are so unsubstantial as not to need further argument.

Opinions Below

The Memorandum Decision of the Supreme Court (Appendix of the Jurisdictional Statement, pp. 1-11, [hereinafter App. A, JS,—]) is reported at 48 Misc 2d 763, 265 NYS 2d 744. The opinion of the Appellate Division in and

for the Fourth Judicial Department (App. A, JS, pp. 14-21) is reported at 29 AD 2d 134, 286 NYS 2d 99. The per curiam affirmance on the opinion of the Appellate Division and the dissenting opinion in the Court of Appeals of New York (App. A, JS, pp. 22-27) are reported at 22 NY 2d 802, 293 NYS 2d 903.

Jurisdiction

This suit was brought under New York Civil Practice Law and Rules Section 3001, seeking a declaratory judgment as to whether the ordinance creating the Police Advisory Board in the City of Rochester, New York, was valid, legal, and constitutional, and a temporary restraining order and permanent injunction prohibiting the Board from acting in any manner. The Supreme Court, Monroe County, entered an order declaring the ordinance inconsistent with charter provisions describing the authority of the Commissioner of Public Safety and therefore invalid in major part, on February 4, 1966. On January 11, 1968, the Appellate Division, Fourth Judicial Department, unanimously reversed the determination of the Supreme Court and entered an order declaring the ordinance valid and constitutional. The New York Court of Appeals affirmed the order of the Appellate Division per curiam, on the opinion of the Appellate Division, on June 14, 1968, with Judge John F. Scileppi dissenting on non-constitutional grounds. On September 26, 1968, the Court of Appeals entered an order denying appellants' motion for reargument but allowing the amendment of the remittitur to show that the Court had passed upon questions under the Constitution of the United States (App. A, JS, p. 50).

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257(2).

Questions Presented

1. Whether the ordinance creating a Police Advisory Board to receive, investigate, and make recommendations upon citizen complaints of excessive or unnecessary physical force by members of the local police bureau constitutes a Bill of Attainder directed against police officers in violation of Article I Section 10 of the Constitution.

2. Whether the procedures of the Police Advisory Board including the rights of notice, representation by counsel, cross-examination of witnesses, and right to present evidence and call witnesses are violative of procedural due process under the Fourteenth Amendment.

3. Whether the authority of the Police Advisory Board to make public its recommendations constitutes cruel and unusual punishment of the police officer whose conduct was investigated, in violation of the Fourteenth Amendment.

4. Whether the creation of the Police Advisory Board to investigate complaints of excessive or unnecessary physical force by policemen against citizens is a denial to the policemen of the equal protection of the laws, in violation of the Fourteenth Amendment.

5. Whether cooperation of the Police Bureau and other City officers and employees with the Board in investigating the incident about which complaint was made, without the police officer's consent, violates the police officer's right against self-incrimination and invades his privacy in violation of the Fourteenth Amendment.

6. Whether findings of excessive or unnecessary physical force under the circumstances made by the Police Advisory Board investigating a policeman's conduct constitute determinations of criminality entitling the police officer,

under the Fourteenth Amendment, to indictment by a grand jury, trial by jury, and protection against double jeopardy.

7. Whether the words "excessive or unnecessary physical force" are so vague and indefinite as to render a nonpenal ordinance permitting the investigation of complaints of police brutality unconstitutional under the Fourteenth Amendment.

Statement

In the years preceding the creation of the Police Advisory Board in June, 1963, the City of Rochester (like many other urban centers) had experienced incidents of alleged police brutality which outraged substantial numbers of concerned persons in the community. Typical of the incidents of alleged brutality, and one which indisputably brought about the creation of the board, was the alleged beating of one Rufus Fairwell. Approximately a week after Mr. Fairwell's arrest on charges of assaulting two Rochester police officers, a protest march and meeting of a group of 300 persons was reported in a local newspaper. The group marched on City Hall where a resolution was read by Reuben Davis, a lawyer and President of the Rochester Chapter of the NAACP (later a judge of the City Court of Rochester) which was reported as stating:

> "—That within the past 18 months 'numerous instances of abuse of police authority and, indeed, acts of police brutality have been directed by a small number of police officers of the Rochester Police Bureau against members of the minority ethnic group of the community.'
>
> —That the present city administration (Democratic) and its predecessor (Republican) 'have failed to take any positive action to ascertain the identity of the Rochester Police Bureau personnel involved (in such a pattern of abuse and brutality) . . . or take corrective action against the known perpetrators . . . '

> —That 'this situation, if not immediately arrested and ameliorated, will have a harmful and deleterious effect on the quietude of the community and will adversely affect the enjoyment, by a substantial segment of the citizens of our community, of their constitutional and civil rights.' "[1]

At the same protest meeting one Obadiah Williamson, President of the Monroe County Non-Partisan Political League, expressed his concern that: "August is becoming a bad month in the City of Rochester." He recalled that the previous year there were meetings protesting the misuse of police dogs. Mr. Williamson concluded that "The relationship is at a low point at this time . . . and we are disturbed, profoundly disturbed. We have been unable to have adequate enforcement without brutality. We are not protesting law enforcement . . . We are protesting tonight the brutal beating of one Mr. Rufus Fairwell . . . what happened to Mr. Fairwell could happen to anyone, white or Negro."[2]

In the following months members of the Common Council of the City of Rochester (hereinafter "City Council") reflected upon the grievances of members of the community against the police and upon the poor relationship between the police and large segments of the community, and, in the Spring of 1963, a joint report by the City Council's Public Safety Committee and Law Committee recommended the adoption of an ordinance creating a police advisory board. The Board was to be composed of nine laymen and would function as a "non-police agency" of responsible citizens providing a "ready and simple outlet for

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[1]Record in the Court of Appeals, pp. 138-142.

[2]*Ibid.*

the expression of grievances alleging excessive use of force by police." (Report of Public Safety Committee and Law Committee, 1963 City Council Proceedings [Record in the Court of Appeals, pp. 75-78].)

The joint report listed nine reasons why a Police Advisory Board was urgently needed. In brief, the report recognized the feeling among many responsible citizens that adequate channels of communicating grievances involving police action do not exist and concluded that a police advisory board would: contribute to, rather than impair, the efficiency of police performance; prevent anger and frustrations over grievances from building a wall between citizens and police; protect the majority of the Rochester Police Bureau who perform capably and fairly from trial by whisper, rumor, and innuendo; strengthen bonds of mutual respect between police and citizenry; permit community attention to be devoted to other essential human rights; provide a ready and simple outlet for expression of grievances alleging excessive use of force by police by those persons to whom traditional legal routes of redress are remote; cure some of the problems of a metropolitan police force and some of the problems of a generally disadvantaged nonwhite minority; and offer a chance for the release of much undesirable emotion and hostility.

City Council passed the ordinance creating the Police Advisory Board and, on May 20, 1963, the City Manager appointed its nine members: three clergymen, a physician, a labor union official, a business executive, an attorney, an educator, and an accountant. Two members of the Board were black men.

The ordinance creating the Board[3] provides that no active law enforcement officer may serve as a Board member and prescribes the Board's jurisdiction and powers as follows:

> §10-10.2 [§17-2]. The purpose of this board is to hear complaints of citizens against any member of the Rochester Police Bureau for alleged acts which fall within the board's jurisdiction, to investigate these complaints, and to recommend such action as the board thinks appropriate on each complaint.
>
> §10-10.3 [§17-3]. The jurisdiction of the board is limited to consideration of complaints against any member of the Rochester Police Bureau, which complaint alleges the use of excessive or unnecessary physical force by a member of the Rochester Police Bureau against a person or persons.
>
> §10-10.4 [§17-4]. The powers of this board are limited to those of an investigative and advisory nature, without any judicial or disciplinary powers.

The procedures for receiving, investigating, and making recommendations with regard to complaints of excessive or unnecessary physical force by a police officer are outlined in the ordinance and elaborated upon in the rules and regulations adopted by the Board and authorized by the ordinance (App. B, JS).

The Board is empowered to receive, investigate, and make recommendations regarding police conduct and not "criminal" acts. It has no power to discipline a police of-

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[3]App. A. JS, pp. 27-34. Citations to the Municipal Code throughout this Motion to Dismiss are, in the first instance, to the numbered sections of the Code in existence at the commencement of this suit, since those are the numbers appearing throughout the Record and in the Memorandum Decision of the Supreme Court. The same provisions appear in the present Code although they bear the new numbers indicated in App. A, JS, pp. 27-34.

ficer believed to have used excessive or unnecessary physical force against a member of the community, it has no power to affect his job security in any manner. The Board cannot grant relief of any kind; it cannot impose fine or penalty upon a police officer. It makes recommendations to the Commissioner of Public Safety, who makes his own determination of the "probable cause of the charges" (Exhibit B, JS). If the Commissioner determines there is probable cause, he may then order a disciplinary hearing, and ultimately suspend, fire, fine or reprimand the police officer. Invariably, the Commissioner or someone in his department makes public the results of disciplinary proceedings, which have often already been brought to the public's attention when the local newspapers report the underlying incidents and the preferring of charges against named officers.

In those instances where the Commissioner determines that there is no probable cause and that there will be no disciplinary hearing the Board is authorized to make public its recommendations to the Commissioner. It is the only means by which the public can be apprised of the final step of the processing of the complaint against the officer. Again, as a practical matter, frequently members of the community are aware of the underlying incident and of the complainant's charge of police brutality.

Appellants contend that the ordinance creating the Police Advisory Board is a Bill of Attainder in violation of Article I Section 10 of the Constitution. They contend the Fourteenth Amendment due process requirements are violated as that amendment incorporates the first ten amendments, by denying their alleged rights to: indictment by a grand jury; trial by jury; compulsory process; cross-examination of witnesses; remain silent to avoid self-incrimination;

privacy; equal protection of the law; and protection from cruel and unusual punishment and double jeopardy. Finally, appellants contend that the ordinance creating the Board creates an indefinite and vague standard of "excessive or unnecessary physical force" to which the police officer should not be held to account because he cannot fairly pattern his conduct within permissible bounds.

ARGUMENT

I

The ordinance creating the Police Advisory Board with jurisdiction only to receive, investigate and make recommendations in connection with citizen complaints of excessive or unnecessary physical force by police is not a Bill of Attainder prohibited by Article I, Sec. 10 of the Constitution. This Court has consistently held that a Bill of Attainder is a legislative act that applies to named individuals or to a group of easily ascertainable persons in such a way as to inflict punishment on them without a judicial trial: *Cummings v. Missouri,* 4 Wall (US) 277, 18 Led 356, 363; *United States v. Lovett,* 328 U.S. 303, 315, 90 Led 1252, 1259; *United States v. Brown,* 381 US 437, 448-49, 14 Led 2d 484, 492. The Police Advisory Board ordinance (hereinafter "PAB ordinance" or "ordinance") does not single out named police officers or an easily ascertainable group of police officers but merely authorizes investigations of any police officer thereafter accused of using excessive or unnecessary physical forces against a citizen.

Moreover, the PAB ordinance does not impose a predetermined punishment on those individuals whose conduct is reviewed by the Board. In *Lanza v. Wagner,* 30 Misc. 2d

212, 220 NYS 2d 477, aff'd 15 AD 2d 552, 222 NYS 2d 1019, mod. 11 NY 2d 317, 229 NYS 2d 380, appeal dismissed 371 US 74, 9 Led 2d 163, cert. denied 371 US 901, 9 Led 2d 164, this Court was asked to review a New York statute on the ground that it inflicted punishment on the incumbent members of the New York City Board of Education and therefore constituted a Bill of Attainder. The statute was enacted following a legislative determination that there was cause for grave concern and a lack of public confidence in the manner in which the City's school system was being operated. The statute provided that the terms of all those then serving on the Board of Education would terminate on a certain date, and new appointments would be made by the Mayor under a new selective process. The New York Court of Appeals held that the statute did not inflict punishment on the ousted members of the Board of Education because their employment was terminated following public criticism of their conduct by the legislature. This Court dismissed the appeal as not raising a substantial federal question.

II

The procedures of the Police Advisory Board do not violate the procedural due process requirements of the Fourteenth Amendment. This Court held in *Hannah v. Larche*, 363 US 420, 440, 4 Led 2d 1307, 1320, that the requirements of due process vary with the type of proceeding involved. The Rochester Police Advisory Board may only investigate written, sworn allegations pertinent to its jurisdiction, study and collect information relating thereto, and make findings and recommendations to the Commissioner of Public Safety (who has direct disciplinary jurisdiction over police officers) and the City Manager. It may, if the Commissioner does not take action satisfactory to the Board, make public

its recommendations. The Police Advisory Board's function is investigative and fact-finding. Its authority is responsive to its purpose in existing: it is an impartial, irreproachable panel of lay persons receiving and investigating complaints of police brutality, making findings with respect thereto, forwarding those findings to the public officer charged with assuring the proper conduct of the municipality's policemen, and, when no further action is to be taken with respect to conduct the Board determines is excessive or unnecessary under the circumstances, expressing the Board's conclusion to the community entitled to be informed of the outcome. The Police Advisory Board, like the Federal Commission on Civil Rights reviewed in the *Hannah* case, *supra,* does not adjudicate, hold trials, or determine civil or criminal liability of police officers. It does not issue orders or indict, punish or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property.

To the extent that the Board's authority to make public its recommendations may be held to place a greater burden on the Board in affording protections to the police officer whose conduct is being investigated, that burden is more than met by the rules and regulations of the Board which provide that a police officer is entitled to: (a) be notified in advance of any hearing of the contents of the verified complaint; (b) confront the complainant at the time of the hearing, cross-examine the complainant and his witnesses; (c) be represented by counsel or have counsel appointed for him; (d) present evidence and call witnesses on his own behalf.

These protections must be compared with the procedures of the Federal Commission on Civil Rights which were upheld under attack of violation of procedural due process.

Although that Commission had the authority to hold public hearings with television and newspaper coverage in connection with complaints of violations of civil rights, those persons against whom complaints were made were not entitled to cross-examine witnesses, be advised of the identity of the complainant, or present witnesses on their own behalf: *Hannah v. Larche, supra.* Moreover, in *Jenkins v. McKeithen,* 286 F. Supp. 537 (E.D. La.) prob. juris. noted, 37 US Law Week 3208, a three-judge federal court upheld the Louisiana Labor-Management Commission of Inquiry against an attack on procedural due process grounds. The Labor-Management Commission of Inquiry was charged by the legislature with the responsibility of investigating and finding facts relating to violations or possible violations of state and federal criminal laws in connection with labor-management relations. It was directed to supplement and assist local district attorneys in connection therewith, and to publicize its findings with respect to the question of whether there is probable cause for believing there were violations of the criminal law by certain individuals. The Labor-Management Commission of Inquiry did not permit the accused assistance of counsel, the right of confrontation, the right of cross-examination of witnesses, or the right to compulsory process for their witnesses.

III

The authority of the Police Advisory Board to make public its recommendations when its recommendations are to be the last step in the processing of a complaint of police brutality is not cruel and unusual punishment of the police officer whose conduct was investigated. The power to make public recommendations is not punishment. In *Trop v. Dulles,* 356 US 86, 96, 2 Led 2d 630, 639-40, this Court noted

that the purpose of the statute being reviewed is determinative of whether it is a penal law or not. If the statute imposes a disability for the purpose of punishment it is penal, but if it imposes a disability to accomplish some other legitimate governmental purpose it is not. Thus deportation and prohibition from carrying on a particular business have been upheld against a claim of cruel and unusual punishment: *Zwick v. Freeman,* 373 F 2d 110, 119 (2d Cir.), cert. denied 389 US 835, 19 Led 2d 96; *Burr v. Immigration & Naturalization Service,* 350 F 2d 87, 90-91 (9th Cir.).

The authority to make public its recommendations is not directed at punishing a police officer for unseemly conduct. It reflects a judgment of the municipality that the Police Advisory Board cannot serve its function in assuring citizens of an impartial depository for its grievances when grievances so channeled are never heard from again. That this ability to make public its findings is reasonably determined to be a prerequisite to a viable police advisory board, which in turn is a reasonable institution for promoting effective and impartial law enforcement, is confirmed by the *Report of The National Advisory Commission On Civil Disorders,* 143-144, 206, 291-292 (Bantam Press ed. 1968); *Report of the President's Commission on Crime in the District of Columbia,* p. 218 (1966).

Furthermore, the power to make public its recommendations to the Commissioner of Public Safety is not cruel and unusual, even were it to be considered, for purposes of argument, punishment. The concept of "cruel and unusual" reflects a judgment that punishment is disproportionate to the act being punished and is not reasonably related to a valid public purpose: *Zwick v. Freeman, supra,* 373 F. 2d at 119. This Court has recently observed that even as to the ordinary person "exposure of the self to

others in varying degrees is a concomitant of life in a civilized community": *Time v. Hill,* 385 US 374, 388, 17 Led 2d 456, 467. With respect to a policeman, this Court has noted that he is directly, immediately and entirely responsible to the city which is his employer. "He is a trustee of the public interest, bearing the burden of great and total responsibility to his public employer": *Gardner v. Broderick,* 392 US 273, —, 20 Led 2d 1082, 1086. Accord, *Spevack v. Klein,* 385 US 511, 519, 17 Led 2d 574, 580. Finally in *New York Times Co. v. Sullivan,* 376 US 254, 270, 11 Led 2d 686, 701, this Court recognized a national commitment to the principle that debate on public issues should be uninhibited, and that a vehement, caustic, and sometimes unpleasantly sharp attack on government and public officials is often a consequence of that commitment. If the police officer is accountable for his official acts which are, in turn, a public trust, if he is susceptible to vehement and caustic attacks by the public, then a dispassionate publication of findings relating to his official conduct where no penalty ensues cannot be said to constitute cruel and unusual punishment. In *Barr v. Matteo,* 360 US 564, 575, 3 Led 2d 1434, 1443, this Court upheld the defense of absolute privilege in a libel suit against a governmental department head who, after his department was attacked, issued a press release condemning several employees. This Court noted the importance of official response in matters of wide public interest and concern.

IV

The creation of the Police Advisory Board to review complaints of police brutality is not a denial to the police of the equal protection of the laws. The constitutional right to the equal protection of the laws goes no further

than prohibiting "invidious discrimination": *Loving v. Virginia,* 388 US 1, 10, 18 Led 2d 1010, 1017; *Baker v. Carr,* 369 US 186, 244, 7 Led 2d 663, 702; *Williamson v. Lee Optical of Oklahoma, Inc.,* 348 US 483, 489, 99 Led 563, 573. In *Williamson* this Court noted (348 US at 488, 99 Led at 572) that: "It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." Accord, *Baker v. Carr,* 369 US at 253, 7 Led 2d at 707.

Rochester's City Council determined that the evil at hand in the matter now before the Court is the incidence or suspicion of police brutality against members of the community and its divisive effect thereon. The classification of police officers as a group reflects a realization that they are the representatives of governmental authority who are regularly exposed to situations requiring the use of force against the citizen[4], that the needless or excessive use of force by some of their number has been the cause of disharmony in the community and the abuse of the rights of some citizens. The fact that the conduct of all public employees is not made reviewable by the Police Advisory Board does not render this rational measure to channel grievances of police brutality violative of the equal protection clause of the Fourteenth Amendment: *Railway Express Agency v. New York,* 336 US 106, 110, 93 Led 533, 539.

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[4]Arthur Cornelius, Superintendent of the New York State Police addressed newly sworn state troopers advising them that: "You must live as though you are in a glass house for everyone observes your actions wherever you are": *O'Shea v. Martin,* 34 Misc. 2d 987, 989, 230 NYS 2d 935, 938.

V

Section 10-10.6 [17-6] of the Police Advisory Board ordinance provides that "All city officers and employees are hereby directed to cooperate with the Board in carrying out its duties." Appellants' contention that this statement of legislative intent authorizes and constitutes an unconstitutional search and seizure of a police officer's effects, an invasion of the privacy of the officer, and a violation of his right against self-incrimination are completely without merit.

The Police Advisory Board has no subpoena powers. Appellees have cited no incident of invasion of a police officer's home, papers, or person, neither have they accused the Police Advisory Board of claiming a right to do so. The Police Advisory Board has officially and consistently recognized what was implicit in the ordinance creating the Board, — the police officer's right to remain silent and not incriminate himself (Record in Court of Appeals, pp. 114-117). The precatory direction to city officers and employees to cooperate with the Board in investigating a specific charge of police brutality is not reasonably susceptible of the interpretation appellants urge upon the Court — the indiscriminate and coerced revelation of all information relating to the police officer whose conduct is being reviewed, whether pertinent to the inquiry or not.

The Board is entitled to the assistance of the Chief of Police by virtue of his independent investigation of the incident in which the allegedly excessive conduct occurred, and those others in the Police Bureau or elsewhere who would have information to contribute in that regard. Moreover, whether or not the ordinance had expressed this sense of cooperation in the Board's investigation on the part of other municipal employees, a police officer would have no

right (whether characterized as privacy, protection against search or seizure or self-incrimination) to prevent a departmental investigation and cooperation by his fellow police officers and other city employees with that investigation: *Mancusi v. DeForte,* ——US——, 20 Led 2d 1154, 1160.

VI

Appellants claim that a finding by the Police Advisory Board that a police officer used excessive or unnecessary physical force against complainant under the circumstances is tantamount to a determination of criminality and entitles the police officer to indictment by a grand jury, trial by jury, and the defense of double jeopardy should a criminal prosecution follow.[5]

The finding that a police officer used excessive or unnecessary physical force under the circumstances is not a determination of criminality; the finding is not punishable by fine or imprisonment or both: *Bloom v. Illinois,* —— US ——, 20 Led 2d 522, 528. While the conduct may also constitute a crime, the Board is not directed to make its findings in accordance with the penal law and does not suggest that it has found the police officer guilty of a crime. Contrast *Jenkins v. McKeithen,* 286 F. Supp. 537 (E.D.La.) probable juris. noted, 37 US Law Week 3208. The Board's existence is not predicated upon assisting the district attorney in ferreting out crimes committed by police officers (*Ibid*).

Moreover, only those accused of serious crimes are entitled to indictment by grand jury and trial by jury under

[5]Such a claim, if meritorious, invalidates all departmental disciplinary proceedings as well as civil actions based upon assault, to name just a few proceedings.

the Fourteenth Amendment: *Duncan v. Louisiana,* —— US ——, 20 Led 2d 491, 496. A critical factor in determining whether a crime is serious in this respect is the potential term of imprisonment (*Ibid*). There is no imprisonment following a determination by the Police Advisory Board.

With respect to the issue of double jeopardy, the appellants are premature in raising this question since no criminal prosecution has been brought against police officers whose conduct was investigated by the Board. Nevertheless, it has long been held in New York that a disciplinary proceeding which may result in dismissal or some other penalty is a civil proceeding and not susceptible of a claim of double jeopardy: *Evans v. Monaghan,* 306 NY 312, 324, 118 NE 2d 452, 458; *Kramm v. Board of Regents,* 51 Misc. 2d 433, 436, 273 NYS 413, 416; *Brawer v. Criminal Court,* 47 Misc. 2d 411, 261 NYS2d 990. Clearly, an administrative procedure which cannot result in any punishment at all, but at most a recommendation to another agency which must itself conclude a disciplinary proceeding before imposing any penalty, cannot place a police officer in double jeopardy.

VII

The words "excessive or unnecessary physical force" are attacked by appellants as being so vague in defining prohibited conduct as to render the ordinance permitting the Board's investigation of complaints of police brutality unconstitutional. The words attacked are, to the contrary, clear and specific in meaning, and would be to a man of common intelligence. They contemplate force "exceeding the usual, proper, or normal" and "beyond whatever is essen-

tial for some purpose": *Webster's Third International Dictionary* (1966). Similar language is regularly employed in penal laws. The new New York Penal Law uses language such as "necessary" and "reasonable" in defining the justification for use of physical force in defense of a person: New York Penal Law §35.15.

The police officer really complains here of his inability to predict what conduct the Police Advisory Board will conclude falls under the terminology excessive or unnecessary. This determination could not be more narrowly particularized by City Council without nullifying the purpose of creating the Police Advisory Board. Even so, the standard as is is set forth, meets the "constitutional test of requisite certitude": *Doe v. C.A.B.*, 356 F 2d 699, 701 (10th Cir.). Moreover, the Police Advisory Board, having reached a determination of excessive or unnecessary physical force, does not impose penalty, fine, imprisonment or suspension upon the police officer whose conduct is subject to the determination. The standard, then, is not subject to the same strict definition to which such a standard might be held if the ordinance deprived the police officer of life, liberty, property, license, or freedom of expression: *Whitehill v. Elkins*, 389 US 54, —, 19 Led 2d 228, 232; *Cramp v. Board of Public Instruction*, 368 US 278, 287, 7 Led 2d 285, 292; *Jordan v. DeGeorge*, 341 US 223, 231, 95 Led 886, 892.

The police officer, as employee, is subject under the civil service laws (and in this particular case to a Charter provision encompassing the civil service requirements) to a complete review of his behavior for purposes of discharge, fine, reprimand or suspension. The Rochester police officer can be fired for being guilty of some delinquency or misconduct showing an unfitness for office, standards far less particular than the one here attacked (Exhibit B, JS). The police officer, as "trustee of the public interest" can be held

accountable for conduct which was violative of that trust and can be expected to conduct himself in accordance therewith in the absence of narrow particularization of its limits: *Gardner v. Broderick*, 392 US 273 —, 20 Led 2d 1082, 1086.

CONCLUSION

It is submitted that the decisions of the Appellate Division and the Court of Appeals are correct in finding no constitutional impediment to the ordinance creating the Rochester Police Advisory Board, that appellants' questions are so unsubstantial as not to need further argument, and that the appeal should, therefore, be dismissed.

Respectfully submitted.

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No. 799

In The

Supreme Court of the United States

October Term, 1968

THE LOCUST CLUB OF ROCHESTER, et al,

Appellants,

vs.

THE CITY OF ROCHESTER, et al,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY TO MOTION TO DISMISS

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REPLY TO MOTION TO DISMISS

Questions Presented

1. Whether the Constitutional issues raised by the ordinance establishing the Police Advisory Board and procedures promulgated thereunder are substantial.
2. Whether an ordinance establishing a Board with the power to utter "findings" with reference to the use of excessive or unnecessary force of named citizens and which Board is devoid of even a legal obligation to investigate the issues; to permit the accused a public hearing; confrontation of his accuser; the power to subpoena; the right of appeal is consistent with the Bill of Rights and the Constitution of the United States.

The Issues Are Substantial

Respondents contend in their motion to dismiss the appeal that the issues are not substantial because the ordinance establishing the Police Advisory Board does not impose a "predetermined punishment", nor is there a denial of due process of law under the doctrine of *Hannah vs. Larche,* 363 U.S. 420 in that the accused is not deprived of his life, liberty and property, nor is the accused denied the equal protection of the laws.

Appellee's describe the function of the Police Advisory Board at page 11 of their motion to dismiss as follows:

> " . . . it is an impartial, irreproachable panel of lay persons receiving and investigating complaints of police brutality, making findings with respect thereto, forwarding those findings to the public officer charged with assuring the proper conduct of the municipality's policemen, and when no further action is to be taken with respect to conduct the Board determines is excessive or unnecessary under the circumstances, expressing the Board's conclusion to the community entitled to be informed of the outcome . . . "

An examination of the ordinance as a totality together with the rules and regulations promulgated thereunder, the opinion expressed by the Corporation Counsel of the City of Rochester to the Police Advisory Board itself; and the object of the inquiry demonstrate the chasm of difference that exists in the matters decided by this Court in *Hannah vs. Larche,* 363 U.S. 420 and the issues raised by the Police Advisory Board. At page 115 of the Record on Appeal to the Court of Appeals the Corporation Counsel of the City of Rochester rendered this opinion with reference to the procedures of the Police Advisory Board:

> "Will the Corporation Counsel represent individual policemen against whom a complaint is lodged is "No." We feel if the police officer desires counsel he should have his own private counsel. This opinion is consistent with our policy during the three years of this administration in regard to *criminal actions* pending against a city employee, whether police or in other divisions of the City, my office has not represented them. . . . If the *criminal act* was in fact committed it would be outside the scope of employment since the City of Rochester does not authorize the committing of crime" (Appellant's italics).

At page 77 of the Record on Appeal to the Court of Appeals the Board is also described as an alternative to the "traditional legal routes of redress". The behavior said to be controlled by the ordinance already constitutes a crime or crimes under the Statutes of the State of New York and the United States.

If the Commissioner in charge of the discipline of the police officers and other members of the police force do not act in a manner "satisfactory" to the Board, then the Board's "finding" of police brutality of a named police officer is published as rebuke to the City Fathers and the infliction of official governmental defamation of the proscribed police officer. See Section 17-24 of the Code of the City of Rochester, Volume I, Chapter 17, contained at page A34 of the Statement of Jurisdiction.

The decision in the *Hannah vs. Larche,* 363 U.S. 420 is based on the concept that the Commission does not "adjudicate". See page 442 of *Hannah vs. Larche.* Justice Frankfurter's concurring opinion at page 488 of *Hannah vs. Larche* crystallizes the disparity between the purposes of the Police Advisory Board and the Commission on Civil Rights:

> " . . . Were the commission exercising an accusatory function; were its duty to find that named individuals were responsible for wrongful deprivation of voting rights, and to advertise such finding or to serve as part of the process of criminal prosecution, the rigorous protections relevant to criminal prosecutions might well be the controlling starting point for assessing the protection which the Commission's procedure provides . . . The purpose of its investigations is to develop facts upon which legislation may be based".

It is not suggested that the ordinance establishing the Police Advisory Board functions for any other governmental purpose but punishment. It's sole purpose is to adjudicate, clear and condemn. The fact finding is directed not toward future legislation but toward punishment and official denunciation. The alpha and omega of the proceeding is punitive.

The publication of an official finding that a particular police officer is guilty of police brutality can and does constitute punishment. Punishment encompasses more than fines or imprisonment. See *Kennedy vs. Mendoza,* 372 U.S. 144 at pgae 168 and *Trop vs. United States,* 356 U.S. 86, 96. In *Cummings vs. Missouri,* 71 U.S. 277 at page 320, 321, 322 the Court commented:

> "The learned counsel does not use the terms — life, liberty and property as comprehending every right known to law. He does not include under liberty freedom from outrage of the feelings as well as restraints upon the person. He does not include under property those estates which he may acquire in professions, though they are often the source of the highest emoluments and honors . . . Any deprivation or suspension of the rights for past conduct is punishment . . . "

In *New York Times vs. Sullivan,* 376 U.S. 254 at page 275 James Madison is quoted as arguing the following:

> "If we advert to the nature of the Republican Government we shall find that the censorial power is in the people over the government and not in the government over the people . . . It is not fair to say that this indiscriminate censure is not punishment. If it falls on classes or individuals it is a severe punishment." See pages 234 and 235, the Bill of Rights, Its Origin and Meaning, Brandt, (New American Library 1965).

The architects of our form of government recognized that attainder, official defamation, and censorial comment by government could be destructive of human rights and was therefore a very real form of punishment.

In his concurring opinion Justice Douglas in *Peters vs. Hobby,* 349 U.S. 331 at page 351 commented:

> "We deal here with the reputation of men and their right to work, things more precious than property itself. We have here a system that condemns a man to a suspect class and the outer darkness without the rudiments of a fair trial".

The blasting of a man's character and the destruction of his reputation does constitute a deprivation of a man's liberty.

Section 17-20 of the Code of the City of Rochester, Volume I, Chapter 17, See Appendix B, Page A33 of the Judicial Statement, provides:

> "Upon receipt of the Chief's Report, the Board, with the assistance of the staff shall make any independent investigation *it considers necessary*". (appellant's italics)

In short there is not even a legal compulsion to conduct any investigation whatsoever although a named police officer can be accused and condemned of matters involving assault and homicide by the Board. The Board is devoid of any

semblance of due process. Acting without standards and without even an investigation it can literally destroy a man's good name, and put his employment in jeopardy.

To destroy a man's reputation, to put his employment in jeopardy, to expose him to criminal prosecution and public condemnation by government, without a right to an investigation, to a public hearing, to confrontation and the power to develop his defense is not consistent with due process of law. Due process does require that the named person sought to be condemned be granted at least an investigation and a fair and public hearing. *In Anti-Facist Refugee Committee vs. McGrath,* 341 U.S. 123 the Court recognized a procedure resulting in official governmental condemnation is subject to the principle of due process. At pages 144 and 145 Justice Black stated:

> "Our basic law, however, wisely withheld authority for resort to executive investigations, condemnations and black lists as a substitute of legal types of penalties by courts following trial and conviction with procedural safeguards of the Bill of Rights."

Justice Frankfurter concurred and stated at page 170-171 of Anti-Facist Refugee Committee case (cited supra):

> "The heart of the matter is that democracy implies respect for the elementary rights of man, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of Rights . . . Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of rights. At least such is the conviction underlying our Bill of Rights . . . That a conclusion satisfies one's private conscience does not attest to its reliability".

A procedure in which the only investigation required is one that the Board "deems necessary"; in which no public

hearing be had; nor even in which any hearing whatsoever is required does not satisfy the requirements of the Fifth and Fourteenth Amendment of our Constitution. The assertion that the Board is made up of an impartial, irreproachable panel of citizens not only renders the stigma to the person condemned more onerous; but also the condemnation becomes more severe because it purports to have been made through an independent investigation, when, in legal fact, no such investigation was required by law nor made pursuant to the most fundamental rules of fairness.

The substitution of private consciences and secret investigations for the objective rule and standards of law is a denial of due process. Justice Frankfurter's comments in *Anti-Facist Refugee Committee vs. McGrath,* 341 U.S. 123 at page 171 are an appropriate answer to this procedure:

> " . . . That a conclusion satisfies one's private conscience does not attest to its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached . . . Secrecy is not congenial to truth seeking and self-righteousness gives too slender an assurance of righteousness".

The difficulty is compounded when no standard or guide whatsoever is granted to the tribunal with the power of condemnation.

No definition whatsoever is given to the Police Advisory Board as to what constitutes excessive or unnecessary force. That a man cannot and should not be punished unless he is punished under a known and existing law is a principle as old as the jurisprudence of Western man. In *Anti-Facist Refugee Committee vs. McGrath,* 341 U.S. 123 at page 177 Justice Douglas commented upon honorable men applying vague or unknown standards:

> "It is not enough to know that the men applying the standard are honorable and devoted men. This is a government of *laws* not of *men*. The powers being used are the powers of government over the reputations and fortunes of men."

Only the most vicious of modern tyrannies subjected its citizens to the principle that any act against the "sound feeling of the nation" should be made punishable whether there was a pre-existing law. See pages 73 and 74, Burdick, Law of Crime, (Matthew Bender 1946.)

In *Anti-Facist Refugee Committee vs. McGrath,* 341 U.S. 123 at page 180 the concurring opinion of Judge Douglas stated:

> "A disloyalty trial is the most crucial event in the life of a public servant. If condemned he is branded for life as a person unworthy of trust or confidence . . . To make that condemnation without meticulous regard to the decencies of a fair trial is abhorrent to fundamental justice."

A brutality trial is the most crucial event in the life of a police officer. If condemned he is branded for life as a person unworthy of trust or confidence. To make that condemnation without regard for the decencies of a fair trial is likewise abhorrent to fundamental justice.

In *Hannah vs. Larche,* 363 U.S. 420 at page 488, 489 Justice Frankfurter clearly distinguished the procedures and purposes of the Civil Rights Commission as contrasted to the procedures now being used by the Police Advisory Board:

> "Its investigation would be turned into a forum for the litigation of individual culpability . . . Judgments by the Commission condemning or stigmatizing individuals are not called for . . . When official pronouncements on individuals purport to rest on

> evidence and investigation, it is right to demand that those so accused be given a full opportunity for their defense in such investigation, excepting of course, grand jury investigations."

The Police Advisory Board's power is directed solely toward findings of police brutality and such judgments condemning and stigmatizing named individuals, which condemnations purport to rest on evidence and investigation, should be permitted to be made by government only after the most scrupulous procedures and safeguards are provided to the accused. However the Police Advisory Board is not even obligated to conduct any investigation whatsoever before it issues its scathing condemnations.

The punishment envisioned by the Appellees also looks toward community pressure and retaliation. The intermingling of governmental exposure with community reprisal can also result in coercion and punishment. In *N.A.A.C.P. vs. Alabama,* 357 U.S. 449 at page 463 the Court recognized that the interplay of state action together with community pressure could result in not only economic reprisal, loss of employment, physical coercion and other manifestations of public hostility resulting in serious damage to the persons deliberately exposed.

It is also suggested that the ordinance establishing the Police Advisory Board is not violative of the principle of the equal protection of the laws granted to each citizen because there is no "invidious" discrimination and that the Board is a rational way to correct the evil at hand. If the Board has no punitive power Appellants do not comprehend the manner in which the evil at hand is corrected. As a civil servant the police officer is denied not only the protection of the Charter of the City of Rochester but also his rights under the Civil Service Laws of the State of New

York; as a person accused of acts criminal in nature but resulting in extra-legal punishment, he is deprived of the standards set by the Penal Law of the State of New York and the procedural safeguards granted to any person accused of crime by both the Code of Criminal Procedure of the State of New York and the Constitution of the State of New York; as a citizen of the United States it appears to the police officer that the rights granted to citizens under the Constitution and the Bill of Rights are illusory with reference to him.

The proper mode of trial of charges of police brutality is exemplified in the trial of the soldiers and officer accused of perpetrating the Boston Massacre. The heirs of those who conducted that trial cannot and should not forget that despite public hostility; the prejudice of the press, the turmoil of the times, the accused were granted a judicial trial which could not be faulted by Tory, Rebel, nor history. Those precedures should not be forgotten.

The constitutional safeguards of the Bill of Rights are not and should not be so flexible as to apply only in tranquil times and be swept away as technicalities when the winds of turmoil sweep the land.

CONCLUSION

The jurisprudence of our Republic has not progressed to this juncture in history only to return to the practices and procedures of the Star Chamber. Appellants respectfully renew their plea that this matter be heard.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

October Term, 1968.

THE LOCUST CLUB OF ROCHESTER ET AL. *v.* CITY OF ROCHESTER ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 799. Decided January 27, 1969.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE BLACK and MR. JUSTICE WHITE are of the opinion that probable jurisdiction should be noted.